FOCUS, 75 F.3d at 840 (quoting *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 (8th Cir.1995)). Moreover, a District Court does not have jurisdiction over "challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *See Feldman*, 460 U.S. at 486, 103 S.Ct. 1303.

Upon careful review of the record, we agree with the District Court that it lacked jurisdiction to review Chajkowski's complaint. As appellees correctly assert, Chajkowski was afforded the opportunity to litigate the claims set forth in her complaint in the state courts, and indeed she did so with the help of counsel through two complete rounds of appeals. Granting her the requested relief would be the equivalent of allowing her to use the federal courts as a forum to appeal a state court judgment and falls squarely within the *Rooker-Feldman* doctrine, which applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the District Court proceedings commenced and inviting District Court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, --- U.S. ----, 125 S.Ct. 1517, 1521-22, 161 L.Ed.2d 454 (2005).

We further reject as meritless Chajkowski's contention that this case somehow falls within an exception to the *Rooker-Feldman* bar because the state court judgment was rendered "nonfinal" as a result of the state court's failure to enforce its bifurcation order, and dispose of it without further discussion. Finally, Chajkowski's reliance on *Twin City Fire Ins. Co. v. Adkins*, 400 F.3d 293 (6th Cir.2005), is misplaced as *Rooker-Feldman* was found not applicable in that case simply because the doctrine "does not apply to bar a suit in federal court brought by a party that was not a party in the preceding action in state court." *Id.* at 297, *quoting*

United States v. Owens, 54 F.3d 271, 274 (6th Cir.1995). As noted, not only was Chajkowski a party to the state court actions she challenges, she was represented by counsel throughout and offers nothing to support her assertion that due process considerations take this case outside the reach of *Rooker-Feldman*.

Accordingly, for the above reasons, we will affirm the District Court's orders dismissing Chajkowski's complaint and denying her motion for reconsideration.

ORDER TO BE REVIEWED

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4449

MARY ELLEN CHAJKOWSKI, Appellant,

v.

JOSEPH J. BOSICK, Individually; PIETRAGALLO, BOSICK & GORDON, Salary Reduction Profit Sharing Plan; WILLIAM A. PIETRAGALLO, JR., Trustee of the Plan; MARK GORDON, Trustee of the Plan; MAX BAER, Justice of the Pennsylvania Supreme Court; KIMBERLY EATON, Judge of the Court of Common Pleas of Allegheny County; PATRICK R. TAMILA; KATE FORD ELLIOTT, Judge of the Supreme Court of Pennsylvania; CORREALE STEVENS, Judge of the Superior Court of Pennsylvania; JOAN ORIE MELVIN, Judge of the Superior Court of Pennsylvania; JAMES R. CAVANAUGH, Judge of the Superior Court of Pennsylvania.

On appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. Civ. No. 04-cv-01582)
District Judge: Honorable Arthur Schwab

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, and VAN ANTWERPEN, Circuit Judges

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing en banc filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing en banc is DENIED.

BY THE COURT:

/s/ Maryanne Trump Barry
Circuit Judge

Dated: July 5, 2005
RLS/cc: MEC
MEB
ASP

Re: STATE COURT ORDERS

Pennsylvania Divorce Action
Filed: July 2, 1997
FD 97-009496-006

***Bifurcation*/ Stipulation/ QDRO**
2000 2001 2003

Pretrial Order
November 1, 2000

***Bifurcation* Order**
December 26, 2000

Divorce Decree
December 29, 2000

Counsel Stipulation
April 4, 2001

QDRO
February 25, 2003

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSLVANIA--FAMILY DIVISION

MARY ELLEN BOSICK, No. FD 97-9496
Plaintiff

v.

JOSEPH J. BOSICK,
Defendant

ORDER OF COURT

AND NOW, this 1st day of November 2000, following conciliation with counsel for the parties, it is hereby ORDERED, ADJUDGED AND DECREED that this matter is scheduled for a two day trial on the parties' claims regarding equitable distribution of marital property, alimony and/or counsel fees before the undersigned on the 6th and 7th day of February 2001 at 9:30 a.m. in Room 4013.

It is ORDERED that:

1. The parties are to enter into comprehensive stipulations concerning their assets within 45 days, copies of which are to be served upon the undersigned.
2. All discovery shall be completed 30 days prior to the trial date, hereinafter referred to as the "completion date". Any discovery requests, including submitting interrogatories, serving notices which schedule depositions, making request for admissions, and making requests for the productions of documents, shall be made at least 30 days prior to the completion date. In lieu of responding to any untimely discovery request, within 10 days of an untimely request, a party may file and serve an objection on the grounds that the request is untimely. The completion date for making a discovery request may be extended only by

written agreement of the parties which extends the completion date to a specified time or by order of court entered prior to the completion date.

3. No later than 15 days after completion date, the parties to the proceeding shall file and serve pre-trial statements. The pretrial statement shall include the following matters:
    a. The name of each person whom the party intends to call at trial as witness, including expert witnesses. The party shall also attach to the pretrial statement a report of each expert witness listed in the pretrial statement. This report shall describe the witness's qualifications and experience and state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The testimony of any person who is not identified in a timely filed pretrial statement shall be excluded at trial. The testimony of an expert witness may not be inconsistent with or go beyond the fair scope of his or her report.
    b. A list of all the exhibits which the party expects to offer in evidence, containing an identifying mark for the exhibit. Any exhibits that do not exceed three pages shall be attached to the pretrial statement, and all exhibits not attached to the pretrial statement shall be described. Only documents or other writing listed in the pretrial statement may be offered in evidence at trial except as rebuttal evidence. All exhibits shall be available for inspection by any opposing party at any time after the filing of the pretrial statement.
    c. The party's gross income, each payroll deduction, and the party's net income, if the party intends to offer any testimony as to his

other income. If these items are reported on an annual basis, these items shall be listed for the past three years. If these items are reported on a weekly, bi-weekly, twice per month, or monthly basis, these items shall be listed for the past six pay periods.

d. A current expense statement in the form required by the practice and procedures governing an action in support if the party intends to offer any testimony as to his or her expenses.

e. If there is a dispute over the value of pension or retirement benefits, the value which the party places on these benefits, the method of evaluating these benefits, and the facts and documentation upon which the party relies to support his or her valuation.

f. If there is a claim for counsel fee, the amount of fees to be charged, the basis for the charge, and a detailed explanation of the time expended.

g. If evidence will be offered as to the value of any items of tangible personal property, a description of the item, the value which the party places on each item, the method of evaluating each item, and the evidence, including documentation, to be offered in support of this party's valuation. Only brief general testimony as to the total value of all tangible personal property will be permitted if a party does not offer documentation or expert opinion as to the value of items of tangible personal property.

h. If evidence will be offered as to the payment or assumption of liability of any marital debts, the amount of each debt as of the date of separation, the date on which the debt and its

purpose, the amounts and dates of payments made since the date of separation, and the evidence that will be offered to support the claim.

i. If a party claims as marital property any property which is not listed as marital property on the opposing party's inventory and appraisement statement, a detailed description of each item of alleged marital property and evidence, including documentation, that will be offered to support the claim that it is marital property.

j. The equitable distribution, alimony, and counsel fee award which the party recommends that this court make and the party's reasons in support of the recommendation.

4. No pretrial statement or any modification thereafter, may be filed beyond the date of filing established in this court order without an order of court permitting the late filing. THE FILING OF THESE STATEMENTS IS MANDATORY AND APPROPRIATE SANCTIONS WILL BE ENTERED IF THEY ARE NOT TIMELY FILED.

5. Counsel shall confer prior to the filing of Pre-trial Statements and shall enter into a comprehensive Stipulation of Facts Not in Dispute. Such Stipulation shall be filed with the Prothonotary and a copy shall be delivered to this Court at the time of filing pretrial statement.

6. A party who fails to comply with any requirements of paragraph 3(a) through 3(j) of this order of court may not offer any testimony in support of claims for the matters covered in these paragraphs may not be inconsistent with or go beyond the fair scope of the information set forth in the pretrial statement.

In the absence of compelling circumstances, this case will not be continued to accommodate counsel, the parties, or witnesses and all must be present and prepared to proceed on the date and time scheduled.

7. A pretrial conference on the above matters shall be held before the undersigned on the 24th day of January 2001, at 11:30 a.m. in Room 5032.
8. In addition to the above information contained in the pretrial statement each party shall file a brief concerning any disputed issues of law. Such brief shall be filed ten days prior to the trial and any reply brief shall be filed one day prior to the trial.

BY THE COURT:
/s/ Kim D. Eaton, Judge

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSLVANIA FAMILY DIVISION

MARY ELLEN BOSICK, Plaintiff, No. **FD 97-9496**

v. **PACSES No. 940002798**

JOSEPH J. BOSICK, Defendant.

ORDER OF COURT ***[Bifurcation]***

AND NOW, this 26th day of December, 2000, it is hereby ORDERED, ADJUDGED and DECREED that a decree in divorce may be entered prior to the resolution of all pending economic claims in the within matter subject to the following terms and conditions:

1. The entry of a decree in divorce shall not affect Plaintiff's ability to pursue her claims for alimony *pendente lite*, counsel fees, and costs;

2. All economic issues shall survive the divorce decree

3. Defendant shall continue to maintain the existing, or comparable, medical insurance coverage for Plaintiff at his expenses; however, said obligation will terminate at such time as Plaintiff obtains employment where medical insurance coverage is provided for her at no cost to her. In the event that Plaintiff obtains employment and Plaintiff can obtain medical insurance at a cost to her, Defendant then has the option of continuing to cover her, or have her obtain the medical insurance coverage through her employer at Defendant's expense.

4. Plaintiff shall continue to have an insurable interest so that she may maintain ownership of insurance policies, insuring Defendant's life, during the pendency of the proceedings.

5. Defendant shall maintain *pendente lite* or until further Order of Court Plaintiff as the beneficiary of all policies insuring his life on which he has control of beneficiary designation, including but not limited to life insurance available through his employment, and he shall provide counsel for Plaintiff, if requested, proof of insurance and beneficiary designation.

6. All marital property of the parties shall be held in *custodia legis* after entry of a divorce decree, including any and all rights, which Plaintiff may have under ERISA or the Retirement Equity Act of 1984. Defendant shall take whatever steps are necessary to preserve Plaintiff's rights to any retirement interest, such as pension, profit sharing plans, individual retirement accounts, or other similar assets which exist, including maintaining her as a surviving spouse entitled to death benefits upon Defendant's death, even though the parties are divorced. Defendant is further enjoined from making any election to obtain any retirement benefit, whether by electing to retire, loan or otherwise under the Pietragallo, Bosick & Gordon Salary Reduction Profit Sharing Plan or any predecessor or successor plan in which he might have an interest, except as allowed by subsequent order of this Court expressly modifying the provisions of this order and referencing any Domestic Relations Order entered herein respecting any plan or account in which he has any interest. A copy of this order shall be served upon the Plan Administrator of the PB&G Plan. Defendant shall file an interim qualified domestic relations order to preserve Plaintiff's right pursuant to this paragraph.

7. Each party hereby waives, on behalf of his or her estate, the provisions of the witness incompetency provisions of the Pennsylvania Dead Man's Act in the event of his or her intervening death.

8. In the event that Defendant decides to remarry, he shall, prior thereto, obtain a premarital agreement to be effective until equitable distribution or other Order of Court with his intended subsequent spouse: (a) waiving any

interest that she may have as a result of her marriage to Defendant in or to any retirement benefit subject to the provisions of ERISA that she may have; (b) expressly providing that she shall, after her marriage to Defendant, execute all documents necessary to waive any spouse's interest that she may have as a result of her marriage to Defendant in or to any retirement benefit that she may have subject to the provisions of ERISA; and (c) expressly providing that the terms of such premarital agreement are specifically enforceable in equity by Plaintiff.

9. Defendant has represented to Plaintiff that entry of a *bifurcated* divorce will cause her no financial detriment by rendering an otherwise uncollectible debt or judgment collectible by virtue of the entry of a divorce decree. Despite Defendant's representation that no such debt exists and Defendant's representation that he has no present knowledge of any such debt, he is ordered to indemnify and hold Plaintiff harmless in the event that any such debt or judgment is subsequently determined to exist.

10. Plaintiff has represented to Defendant that entry of a *bifurcated* divorce will cause him no financial detriment by rendering an otherwise uncollectible debt or judgment collectible by virtue of the entry of a divorce decree. Despite Plaintiff's representation that no such debt exists and Plaintiff's representation that she has no present knowledge of any such debt, she is ordered to indemnify and hold Defendant harmless in the event that any such debt or judgment is subsequently determined to exist.

BY THE COURT:
/s/ Kim D. Eaton, Judge

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSLVANIA FAMILY DIVISION

MARY ELLEN BOSICK, Plaintiff,
v.
JOSEPH J. BOSICK, Defendant.

No. **FD 97-9496**

PACSES No. 940002798

DECREE IN DIVORCE

December 29, 2000, the court having reviewed this case, finds that the marriage is irretrievably broken.

Any existing spousal support order shall hereafter be deemed an order for Alimony *Pendente Lite* if any economic claims remain pending and it is decreed that the plaintiff, Mary Ellen Bosick, is divorced and separated from the bonds of matrimony contracted between herself and the defendant. The court hereby retains jurisdiction of any claims raised by this action for which a final order has not yet been entered.

By the Court:
/s/Mulligan, J.

Docket entries:

February 20, 2001, Decree issued ***Nunc pro tunc****, subject to procedural administrative review.* Eaton, J.

February 27, 2001, Decree vacated per Order of Court dated February 16, 2001 Order of Court dated 02/26/01. Divorce decree granted. Eaton, J.

March 2, 2001 Divorce Decree granted Order of Court dated 12/29/00. Mulligan, J.

COUNSEL STIPULATION, which
2001 TRIAL COURT ACCEPTED AS EVIDENCE

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSLVANIA--FAMILY DIVISION

MARY ELLEN BOSICK, Plaintiff, No. **FD 97-9496**

v.

JOSEPH J. BOSICK, Defendant.

AND NOW, this 4th day of April,2001, it is hereby stipulated between counsel for Plaintiff and counsel for Defendant that the value of the following Pension Plans and IRAs are as follows:

1. The marital component of Defendant's interest in the PB&G Salary Reduction Profit Sharing Plan as of December 31, 2000 is $1,036,277.00.
2. The non-marital component of Defendant's interest in the PB&G Salary Reduction Profit Sharing Plan as of December 31, 2000 is $87,717.00
3. Defendant's interest in Ferris, Baker Watts, Inc. IRA Account No. 1488546 (formerly Paine Webber IRA) as of December 31, 2000 is $260,903.00. There were no post-separation contributions to this IRA and the entire account value is marital.
4. Defendant's interest in Morgan Stanley Dean Witter IRA Account No. 617-000000-054 as of December 31, 2000 is $3,497.00. There were no post-separation contributions to this IRA and the entire account value is marital.
5. Plaintiff's interest in Morgan Stanley Dean Witter IRA Account No. 617-000000-054 as of December 31, 2000 is $29,562.00. There were no post-separation contributions to this IRA and the entire account value is marital.

Respectfully Submitted,

WILDER & MAHOOD, P.C.

/s/ Joanne Ross Wilder, Esq.
436 Seventh Avenue
10th Floor, Koppers Building
Pittsburgh, PA 15219
Attorney for Plaintiff

GILLOTTI, CAPRISTO, & BECK, P.C.

/s/ Chris F. Gillotti, Esq.
310 Grant Street
215 Grant Building
Pittsburgh, PA 15219
Attorney for Defendant

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSLVANIA FAMILY DIVISION

MARY ELLEN BOSICK, Plaintiff,
v.
JOSEPH J. BOSICK, Defendant.

No. **FD 97-9496**

PACSES No. 940002798

Qualified Domestic Relations Order

Date: February 25, 2003.

This Order applies to the Pietragallo, Bosick & Gordon Amended and restated Salary Reduction Profit Sharing Plan (the Plan) and such other vested retirement plans in which the Participant has or had a beneficial interest. Alternate Payee is the former wife of Participant. This Order assigns to the Alternate Payee the sum of $366,130 of the participant's **vested** account balance under the Plan said sums shall not be subject to any increase and/or decrease as a result of market performance and/or actual interest and dividends earned thereof from the date of this Order to the date that the portion[2] of the plan specified herein is distributed from Participant's retirement benefits to the Alternate payee in a single lump-sum cash payment as soon as administratively feasible following the qualification of this order. See order as specified.

BY ORDER OF COURT:
/s/Eaton, J.

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1. *Plan* assets "frozen" by this order remain in Bosick's control.

Pennsylvania Divorce Action
Filed: July 2, 1997
FD 97-009496-06

401k Exclusions from Child Support Orders

March 18, 1998
APL/child support
Hearing Officer Recommendations

December 30, 1998
APL/child support
Order by Judge Max Baer

December 30, 1998
APL/child support
Opinion by Judge Max Baer

January 4, 1999
APL/child support
Arrears Order by Judge Max Baer

August 4, 2000
401k Exclusions from APL/Child Support
Appeal denied by Order and Opinion of
The Pennsylvania Superior Court of Pennsylvania

April 2, 2001
401k Exclusions from APL/Child Support
Petition for *Allocatur* denied by Order of
The Supreme Court of Pennsylvania

November 2004
APL/child support
$100,519 overpayment made1998-2002 by Bosick
"Due to April 10, 2002 modification," retroactive to1998.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSLVANIA— FAMILY DIVISION

MARY ELLEN BOSICK,
Plaintiff,
v.
JOSEPH J. BOSICK,
Defendant.

No. FD 97-9496

APL/child support
March 18, 1998

EXPLANATION

A. Husband's Income

The Master finds that, while once made the decision may be irreversible for a year, the decision to contribute to husband's Keogh plan is his decision only (rather than one mandated by his law firm) and thus it is voluntary and should be added back to determine husband's post-separation income. However, so long as the parties are not separated (which they are not at present), his contributions, whether voluntary or not, will be included in marital property and will be distributed to the parties.

Post-separation, with the Keogh contribution not deducted, husband's net monthly income is $18,074 as follows:

$371,901	Total Gross Income
-102,806	Federal tax, married filing separately*
- 10,413	State tax
- 3,691	Local tax
- 17,910	Social Security
- 14,879	Necessary business expenses
- 5,204	Medical insurance
$216,892	Annual net
$ 18,074	Monthly net

Tax calculation*

Total taxable income (Exhibit F)	$290,167
Federal tax, married filing separately	$102,806

His pre-separation net income (from which the Master would

deduct the Keogh contribution for the reasons stated earlier) would be increased by $2,458 per month (representing 1/12 of $29,500) making the monthly total $20,532. However, it matters little in the pre-separation situation, since wife's unmet reasonable needs are so small in that instance.

B. The Wife's Earning Capacity

Given that the wife has completed a significant portion (approximately 1/3) of her total law school education, if wife were, in fact, still attending law school, the Master would find it reasonable to give her no earning capacity, but that is not the case. Wife is not in school nor has she been accepted at any law school. Given wife's education (a BA in elementary education and a Master's degree obtained in 1975, as well as four semesters of law school) and her impressive skills demonstrated in a dazzling array of high powered volunteer activities, particularly in the area of fund raising, she simply cannot be considered to have no earning capacity while she neither works nor goes to school. She testified that she has not sought employment because she is a full time mother, but that simply is not persuasive, given the fact that the parties' minor children are 17 and 13.

Wife testified that husband's vocational expert gave an accurate description of wife's skills in her report (Exhibit C). Wife's resume (Exhibit A) also sets forth a good description of wife's skills. Wife did describe another woman of her acquaintance with fund raising skills which were similar to but no better than wife's. Wife testified that the woman was able to obtain paid employment at a $50,000 annual salary. However, unlike wife, that woman was a stockbroker. Husband's expert also put wife's earning capacity at $50,000 per year, but did not offer any specific employment opportunities in the Pittsburgh area that might match wife's skills. Further, it took the stockbroker, with fundraising skills like wife's, two years to land a $50,000 per year job. That being so, the Master believes that, with luck and time, wife could land such a position at a $50,000 annual salary. However, the luck and time needed require a

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSLVANIA— FAMILY DIVISION

MARY ELLEN BOSICK,
Plaintiff,
v.
JOSEPH J. BOSICK,
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No. FD 97-9496

APL/child support
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Wife, through her counsel, testified that she has paid legal fees of $10,165 (of which $523 is costs) and has a still-outstanding counsel fee obligation of $8,538, making her total legal expenses to date $18,703. No counsel fee exhibit was entered, so it is not possible to tell what is done or what remains to be done. The pleadings which have been filed provide little guidance. The first pleading is wife's divorce complaint filed on July 2, 1997. She has also filed her Inventory and Appraisement setting forth the marital property and she has been required to respond to husband's Interrogatories and Request for Production of Documents. There is an order, dated November 18, 1997, permitting the Master to award preliminary counsel fees in excess of $1,000. Wife's budget asserts ongoing counsel fee costs of $1,500 per month. Because the Master does not find sufficient evidence to support prospective fees in that amount (given the amount of work that has obviously been done judging by the fees incurred) the Master adjusts wife's counsel fee need down to $1,000 per month.

In summary, considering the adjustments discussed above, wife's pretax reasonable needs following separation, if she has custody of two minor children, are $14,940 per month as follows:

$18,901	Wife's asserted pretax reasonable needs for herself and two children
- 1,115	Condominium expense to be paid by husband
- 400	Daughter's high school tuition to be paid by husband
- 210	Reduction in children's alleged counseling expenses
- 360	Reduction in food expenses
- 90	Child care expenses
- 500	Counsel fee adjustment
- 1,286	Insurance expense
$14,940	Adjusted pretax reasonable needs for wife and two children

Wife's net earning capacity of $2,320 per month

makes her unmet pretax reasonable needs $12,620 per month. To gross that figure up to sufficiently adjust for wife's income taxes, would require an award to wife which, given the direct payments husband would be making to preserve marital assets, would exceed his total income, although without knowing who would remain in the marital residence after separation, it is not possible to know which party would be entitled to those substantial tax deductions.

This case illustrates the adage that, while husband might have been able to meet the expenses of wife and two minor children when they all resided under one roof, he cannot do it in separate housing. If they separate, the standard of living of both parties and their children will necessarily be diminished.

Adding wife's net earning capacity to husband's net income produces a total of $20,394 per month in possible net family income. The Master is recommending that, if the parties separate and wife has custody of two minor children, husband pay unallocated alimony *pendente lite* and child support of $12,500 per month. In that way, three of the four people will have 73% of the possible income. That fairly allocates what will be necessary belt tightening for everyone.

So long as they are not separated, the Master recommends that wife continue to receive $1,200 per month in rental income plus $500 per month from husband, with husband to pay all household expenses and all of wife's car expenses (which wife has been paying with her allowance). The only expenses wife will be paying from her allowance, rental income, and earning capacity prior to separation will be her counsel fees and her clothing.

March 18, 1998
/s/ Patricia G. Miller, Master

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSLVANIA--FAMILY DIVISION

MARY ELLEN BOSICK, Plaintiff
No. FD 97-9496-1

v.

JOSEPH J. BOSICK, Defendant

FINAL ORDER OF COURT - **APL/child support**

AND NOW, this 30th day of December 1998, after full consideration of Defendant Joseph J. Bosick's, (Father) exceptions, and Plaintiff Mary Ellen Bosick's (Mother) cross-exceptions to the Report and Recommendation of this Court's Hearing Officer, who considered the issues of child support, alimony *pendente lite* (APL) and counsel fees, and in conformity with the Opinion entered on even date herewith in support hereof, it is hereby ORDERED as follows:

1) Mother and Father have three children. Michael, their oldest, is 20 years old and is not pertinent to this case. Brian, the middle child, was born April 6, 1980; was 18 years of age in April, 1998; and graduated from Central Catholic High School at approximately the end of May, 1998. The parties' youngest child, Jennifer, is 14 and lives with mother.

2) Mother filed a *praecipe* to seek child support, APL and counsel fees on July 7, 1997. Our hearing officer entered her recommendation on March 18, 1998. It is stipulated between the parties that after approximately April 1, 1998, they have lived separate and apart. Brian graduated from high school (and was already 18) on or about May 31, 1998. We will decide this case on these premises.

3) From July 8, 1997 through March 31, 1998, Father shall have paid all of Mother's expenses plus given her $500

in direct payments in accordance with the practice that has been followed by the parties during this time frame.

4) We will enter a combined child support, APL order for Mother and two children (Brian and Jennifer) from April 1, 1998 through May 31, 1998 (approximately Brian's high school graduation date), and a combined child support and APL order for Mother and one child (Jennifer) after May 31, 1998.

5) As explained in our opinion, Father's income available for the payment of child support and APL in accordance with applicable law is $16,400 per month, and Mother's income available to support herself and the parties' child(ren) living with her is $700 per month. Accordingly, the parties' combined monthly income is $17,100 of which Father has approximately 96% and Mother has approximately 4%.

6) Also, in accordance with out opinion, we find the reasonable needs for Mother and child(ren) are $10,970.

7) Mother is entitled to APL and child support in the approximate amount of 96% of $10,970 which equals $10,470. We round this amount to $10,400 which shall be our award of APL and child support to Mother and two children effective April 1, 1998.

8) Notwithstanding that Brian did not graduate from high school until May 31, 1998, we removed from Mother's budget those expenses attributed exclusively to him. Accordingly, the same order for $10,400 per month shall remain in effect as support for mother and one child, Jennifer, beginning May 31, 1998.

9) Mother filed for child support, APL and counsel fees on approximately July 8, 1997, and seeks retroactivity to that

date. It is undisputed that the parties lived under the same roof until April 1, 1998, and Father paid virtually all of the reasonable and necessary expenses for Mother and children during that period, as well as providing Mother with an additional $500. Accordingly, Mother's request for a retroactive award of APL and child support from July 8, 1997 through April 1, 1998 is DENIED.

10) Mother's request for lump sum payment of preliminary counsel fees is DENIED.

11) This Court's administrative staff shall enter a form order consistent herewith to allow for our decision herein to be placed on PACSES, and to recompute arrearages.

12) THIS IS A FINAL ORDER. THE PROTHONOTARY SHALL SEND RULE 236 NOTICE TO THE PARTIES.

BY THE COURT,
/s/ Max Baer, Judge.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MARY ELLEN BOSICK, Plaintiff,
v.
JOSEPH J. BOSICK, Defendant

FD 97-009496-001

FINAL ORDER OF COURT
Baer, A.J. Dec. 30, 1998
OPINION
Baer, A.J. Dec. 31, 1998

Plaintiff, Mary Ellen Bosick ("Mother") and Defendant Joseph J. Bosick ("Father") were married on April 6, 1974. They are parents of three children, Michael, age 20; Brian, who turned 18 on April 26, 1998, and Jennifer, age 13. Michael is in college at the University of Dayton. Brian graduated from high school at approximately the end of May 1998, and is now also attending the University of Dayton. Jennifer continues to live with Mother, and is attending Oakland Catholic High School in Pittsburgh.

Mother filed for divorce on July 2, 1997, although the parties continued to live in the marital residence together. Her divorce complaint contained counts for alimony pendente lite (APL), child support, counsel fees and costs, and on July 8, 1997, she filed a praecipe seeking a hearing regarding these claims. The case was declared complex, and was eventually heard by one of this Court's permanent hearing officers beginning February 20, 1998 and concluding March 3, 1998. On March 18, 1998, the Hearing Officer entered a Report and Recommendation. Father filed exceptions and mother filed cross-exceptions. This opinion is entered together with a final order of even date to decide those exceptions.

1. Father's Income

Father is a partner in a large Pittsburgh law firm. The hearing officer found that his monthly net income for purposes of establishment of child support and APL was $18,074. Father took an exception arguing that the $29,500 he contributed to his firm's profit sharing plan was non-voluntary and, therefore, should not have been included as part of his income. We agree as to $20,000 of this amount.

The facts are that two years before the parties separated, Father's law firm's management committee voted to require that mandatory contributions be made to the firm's retirement fund. In accordance with this dictate, Father was required to contribute $20,000. While Father had one of the votes establishing this mandatory contribution, he, by no means, controlled this decision. Moreover, the decision was made while the parties were married and living together. Accordingly, Father's contribution of $20,000 was a non-voluntary contribution to a retirement plan, and should have been deducted from Father's gross income for support purposes. See Pa. R.C.P. No. 1910.16-5(b)(2). The other $9,500 contribution by Father was voluntary, and therefore was properly included in Father's income.

Father also excepts arguing that we should subtract from his net income the $510 per month he has been paying as expenses on the parties' Aspinwall property. As we are no longer imposing the obligation to pay this money upon Father, this exception is moot.

Mother took an exception to Father's income arguing that the hearing officer erred by having Father file using a "married filing separately" tax status rather than a "single" tax status. We deny this exception. There is nothing in the record indicating that the parties will be single during calendar year 1998, or, indeed, in the foreseeable future. Thus, it was reasonable for the hearing officer to use the married filing separately status. Accordingly, we take $20,000 of the amount Father contributed to his firm's pension plan and divide it by 12 to arrive at a monthly figure

of $1,667. We subtract that amount from the $18,074 net income found by the hearing officer, to reach a net income for Father of $16, 407, which we will round to $16,400.

2. Mother's Earning Capacity and Income

Mother had been attending Duquesne Law School, but was asked not to return because she fell short of the minimum grade requirement by the slimmest of margins. She then applied for entrance into the University of Pittsburgh Law School, but, at the time of the hearing, had not yet been accepted or rejected. The hearing officer, on the basis of the fact that Mother was not in law school and had been involved in many significant volunteer activities, assigned an earning capacity of $35,000 per year.

We decline to accept this recommendation. First, the record fairly read makes it unclear whether Mother will or will not be accepted into law school at the University of Pittsburgh. We believe no earning capacity should be assigned pending that decision, and a reasonable time period thereafter. This will allow Mother the opportunity to plan her future intelligently and proactively. If she, in fact, is accepted, she will not have to choose between quitting a new position or completing law school. If she is not accepted, she will have a fair opportunity to seek appropriate employment in an orderly and appropriate manner. We note that notwithstanding Mother's volunteer activities, she has not held a paying job in decades. Accordingly, as of the date and time of this hearing, Mother should have been given an earning capacity of zero.

Father argued that Mother received $1,200 per month from the parties' Aspinwall property, and this should have been included. We agree, but note that in accordance with Father's testimony, there is approximately $500 per month in expenses incident to this property. Accordingly, Mother's monthly net income is $1,200 less $500 or $700.

3. Reasonable Needs of Mother and Children

Mother filed exceptions arguing that she was not awarded sufficient income to meet her and Children's

reasonable needs. Father excepted that the hearing officer's recommendation was punitive and confiscatory. Our hearing officer correctly noted that this case illustrates the adage that a wage earner might be able to meet the expenses of his or her family when they are residing together, but cannot do so when they are separated.

Father takes home $16,400 a month, and Mother takes home $700 a month. This is a total income of $17,100. Nevertheless, Father states his reasonable needs to be $31,000, and Mother states her and Children's reasonable needs to be $19,000. Thus, if one believes the budgets submitted, neither of these parties can live alone on the total net income they bring home together. The reality, however, is that they must. Thus, we will divide the $17,100 between them so that each party and Children can be reasonably maintained. It would have been much easier for us to do this if parties had not submitted whimsical budgets, but we will, nevertheless, undertake the task.

The parties' collective income exceeds our statewide support guidelines. Accordingly, we have conducted an analysis which is analogous to that required by Melzer v. Witzberer, ___ Pa. ___ , 480 A.2d. 991 (1984). We did this by taking the total amount available to meet the reasonable needs of Father, Mother, and Children, and cutting Mother's budget to a level that leaves sufficient monies to meet Father's reasonable needs, while, at the same time, meeting Mother's and Children's reasonable needs. In the case of both parties, reasonability requires that these needs be adjusted in light of the available income.

As we stated above, Mother asserted that the reasonable needs for herself and the parties' Children were $18,900. We have cut her expenses in many categories, and will explain briefly our justification for doing so. We cut Mother's food budget from $1,200 to $840. Mother testified that she could supply food for everyone, including father, for $1,200 per month. Father's estimate for food for everyone but Mother was $840. Accordingly we accepted the $840

figure, as did the hearing officer, as the reasonable amount for Mother and Children. We reduced Mother's clothing allowance from $1,800 per month to $200 per month. We note that Father only requires $200 a month to clothe himself, notwithstanding his $31,000 budget. Whether mother is a socialite, a law student or looking for employment, given her current wardrobe (based upon what she has been spending to date), it is inconceivable that she needs more than $200 a month to supplement it between now and the conclusion of the economic issues surrounding the divorce.

We cut Mother's expenses for parking and tolls from $60 a month to $20 a month, and her car expense from $614 a month to $5[illegible]4 a month. We found both of these figures over-inflated.

We eliminated Brian's expenses entirely. He turned 18 on April 26, 1998, and graduated from high school on or about May 31, 1998. We did not desire to further complicate this case by entering one order for the time period from April 1, 1998 through May 31, 1998, and a second from May 31, 1998 forward. We were going to cut Brian's budget by $1,000 in any event, and felt that it served clarity and judicial economy to cut it the entire amount of $1,328. We are sure Mother can find the $328 we would have left for Brian elsewhere in the over $10,000 we are awarding to her.

We subtracted from Mother's budget the entire $1,115 in condominium expenses for Seven Springs. Throughout this litigation, Mother has argued vehemently that she desires to keep Seven Springs. Indeed, she successfully sought to have us award the condominium, the marital residence and the Aspinwall real property to her as an advance on equitable distribution so that she could refinance the other property to keep Seven Springs.

Father has argued consistently that the parties cannot afford Seven Springs and that it should be sold. If we required Father to pay these expenses, Mother would be keeping Seven Springs notwithstanding Father's assertions that the parties cannot afford it, and we would be imposing

upon him the obligation to pay for it. If we included these expenses in the reasonable needs of Mother and children, Father would be paying almost all of the costs because he earns almost all of the income.

If Mother desires to keep Seven Springs, she should adjust her budget to pay for it. If she cannot afford it, she should sell it. However, the expenses incident to this condominium should not be included as reasonable and necessary in Mother's budget. Accordingly, we subtracted the $1,115 from Mother's reasonable needs, and did not impose the obligation to pay this amount upon Father.

We cut Mother's budget for household help from $239 per month to $100 per month. Again, we believe this is necessary given the amount of income available to these parties. Mother conceded she no longer needed child care, so we eliminated from the budget the $90 allocated to that item. Mother allocated $300 per month for beauty shop and makeup. We cut this to $100 a month, and likewise, cut her entertainment budget from $200 to $100 per month. We cut her papers, books, and magazines from $42 a month to $20 a month, and her charitable contributions from $200 a month to $50 a month. All of these cuts follow the same general theme. There is simply not enough money for either parent, or the Children, to live the same affluent lifestyle they one did and, given the parties' income, these are what can reasonably be afforded by Mother and Children.

We cut Mother's vacation fund from $1,000 a month to $250 a month. This still leaves her with $3,000 per year to take a vacation, and that should be sufficient. We cut her legal fees from $1,500 a month to $500 a month. She is always free to apply for additional legal fees at the conclusion of the case, when we trust there will be substantial property to distribute.

Finally, we cut Mother's other expenses from $1,575 a month to $575 a month. These other expenses are very much perquisites of an affluent lifestyle, and included $800 a month for club dues. Mother can simply no longer afford all

of these accouterments. That completes our adjustment of Mother's budget. Her total expenses per month in accordance with our modifications are $10,970.

In accordance with the teachings of Melzer, Father is obligated for approximately 96% of this amount which would be $10,470. We rounded this to $10,400, and award Mother and Children this amount effective April 1, 1998. As explained above, notwithstanding Brian's 18th birthday and graduation from high school, this award will continue pending further order of court.

Also, pursuant to Melzer, it is necessary to conduct a "gut check" of our award to insure that Father has sufficient funds to support himself. Our award provides Mother and Children with about $11,000 to support themselves, and provides Father with about $6,000 to support himself. We believe this permits all involved to meet their reasonable needs to the extent possible given their available income.

3. Retroactivity.

Mother excepted to the hearing officer's failure to award retroactive arrearages, pointing out that the praecipe to set child support and APL for hearing was filed on approximately July 8, 1997. Normally, Mother would be correct. However, in this case, Mother and Father lived under the same roof through April 1, 1998, and Father paid all of the expenses for Mother and Children and provided Mother with an additional $500 a month. Mother was able to accumulate a substantial savings during that period.

We find that Father's direct payments to Mother of $500, and his payment of all of her and Children's reasonable needs, satisfied Father's obligation to support Mother and Children through the date the hearing officer decided this case – March 18, 1998.

From that date through April 1, 1998, the hearing officer directed that Father continue to pay all of Mother's and Children's expenses and to give Mother $500 a month, which had been the practice between the parties. We will assume he did that. If he did not, we will expect that counsel

will work out any differences in an informal manner. Accordingly, we will set our support order effective April 1, 1998, when father moved from the marital residence, and we direct that retroactivity be set in accordance with our final order as of that date.

Father argued that the hearing officer abused her discretion in awarding preliminary counsel fees of $5,000. We agree. The evidence in this record indicates that Mother had the financial resources to meet her counsel fees through either savings or marital property which she took at the time of separation. Additionally, we have advanced to her the marital residence, the Seven Springs condominium, and the Aspinwall real property which, while not liquid, all have equity. On the basis of total record, we do not believe an award of preliminary counsel fees is appropriate. We did permit Mother to maintain an additional $500 per month in her budget for counsel fees as part of her budget. This will have to be sufficient to permit her to meet her counsel fee needs until equitable distribution.

/s/ Baer, J.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSLVANIA--FAMILY DIVISION

MARY ELLEN BOSICK, No. FD 97-9496
Plaintiff

PACSES No. 940002798

v.

JOSEPH J. BOSICK,
Defendant

ORDER OF COURT

AND NOW, 4th day of January, 1999, based upon the Court's determination that Payee's monthly net income is $700.00 and the Payor's monthly net income is $16,400, it is hereby ordered that the Payor pay to the Domestic Relations Section, Court of Common Pleas, TEN THOUSAND FOUR HUNDRED Dollars ($10,400) a month ($10,400 for current support and **$0.00 on arrears**) payable MONTHLY as follows: ON THE FIRST OF EACH MONTH. The effective date of the order is 04/01/98.

Arrears set at $49,935.00 as of JANUARY 4, 1999 are due in full IMMEDIATELY. Contempt proceedings, credit bureau reporting and tax refund offset certification will not be initiated and judgment will not be entered, as long as payor pays on arrears on each payment date as specified above. Failure to make each payment on time and in full will cause all arrears to become subject to immediate collection by all of the means listed above.

For the Support of: JENNIFER K. BOSICK, BRIAN J. BOSICK, MARY ELLEN BOSICK. Said money to be turned over by the Domestic Relation Section to: MARY ELLEN BOSICK. Payments must be made by CASH, CHECK, MONEY ORDER OR WAGE ATTACH. All checks and money orders must be made payable to: FAMILY DIVISION and mailed to COLLECTIONS AND DISBURSEMENTS at: ALLEGHENY CO. FAMILY DIV, ALLEGHENY BUILDING, 429 FORBES AVENUE, SUITE 201, PITTSBURGH, PA 15219. Each payment must bear your PACSES Member Number in order to be processed. Do not send cash by mail.

[**The next section of this Form Order refers to medical insurance; no determination was made in this case, so this section is omitted**].

IMPORTANT LEGAL NOTICE

PARTIES MUST WITHIN SEVEN DAYS INFORM THE DOMESTIC RELATIONS SECTION AND THE OTHER PARTIES, IN WRITING, OF ANY MATERIAL CHANGE IN CIRCUMSTANCES RELEVANT TO THE LEVEL OF SUPPORT OR THE ADMINISTRATION OF THE SUPPORT ORDER, INCLUDING, BUT NOT LIMITED TO, LOSS OR CHANGE OF INCOME OR EMPLOYMENT AND CHANGE OF PERSONAL ADDRESS OR CHANGE OF ADDRESS OF ANY CHILD RECEIVING SUPPORT. A PARTY WHO WILLFULLY FAILS TO REPORT A MATERIAL CHANGE IN CIRCUMSTANCES MAY BE ADJUDGED IN CONTEMPT OF COURT, AND MAY BE FINED OR IMPRISONED.

PENNSYLVANIA LAW PROVIDES THAT ALL SUPPORT ORDERS SHALL BE REVIEWED AT LEAST ONCE EVERY THREE (3) YEARS IF SUCH REVIEW IS

REQUESTED BY ONE OF THE PARTIES. IF YOU WISH TO REQUEST A REVIEW AND ADJUSTMENT OF YOUR ORDER, YOU MUST DO THE FOLLOWING: CALL YOUR ATTORNEY. AN UNREPRESENTED PERSON WHO WANTS TO MODIFY (ADJUST) SUPPORT ORDER SHOULD CONTACT THE DOMESTIC RELATIONS SECTION.

A MANDATORY INCOME ATTACHMENT WILL ISSUE UNLESS THE DEFENDANT IS NOT IN ARREARS IN PAYMENT IN AN AMOUNT EQUAL TO OR GREATER THAN ONE MONTH'S SUPPORT OBLIGATION AND (1) THE COURT FINDS THAT THERE IS GOOD CAUSE NOT TO REQUIRE IMMEDIATE INCOME WITHHOLDING; OR (2) A WRITTEN AGREEMENT IS REACHED BETWEEN THE PARTIES WHICH PROVIDES FOR AN ALTERNATE ARRANGEMENT.

DELINQUENT ARREARAGE BALANCES MAY BE REPORTED TO CREDIT AGENCIES. ON AND AFTER THE DATE IT IS DUE, EACH UNPAID SUPPORT PAYMENT SHALL CONSTITUTE A JUDGMENT AGAINST YOU.

IT IS FURTHER ORDERED THAT, upon payor's failure to comply with this order, payor may be arrested and brought before the Court for a Contempt hearing; payor's wages, salary, commissions, and/or income may be attached in accordance with law; this Order will be increased without further hearing to $16,640.00 a month until all arrearages are paid in full. Payor is responsible for court costs and fees.

BY THE COURT:
/s/ Max Baer, Judge

IN THE SUPERIOR COURT OF PENNSLVANIA

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759 WDA 1999

MARY ELLEN BOSICK, *Appellant,*
v.
JOSEPH J. BOSICK, *Appellee,*

Appeal from Order Dated April 12, 1999

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811 WDA 1999

MARY ELLEN BOSICK, *Appellee,*
v.
JOSEPH J. BOSICK, *Appellant.*

Appeal from Order Dated April 12, 1999

In the Court of Common Pleas of Allegheny County
Family Division, No. FD 97-009496-001

BEFORE:
FORD ELLIOT, J., CIRILLO, P.J.E., and TAMILIA, J.
*CIRILLO, P.J.E. did not participate in
the consideration or decision of this case.

MEMORANDUM: **Filed Aug. 4, 2000**

Mary Ellen Bosick (Wife) appeals and Joseph J. Bosick (Husband) cross-appeals from an unallocated order of the Court of Common Pleas of Allegheny County requiring Husband to pay $10,400 per month for the support of Wife and one child.

The parties were married on April 6, 1974. Wife is

now 50 year sold and Husband is 52 years old. Three children were born of the marriage, two of whom are emancipated. The youngest child Jennifer, age 15, lives with Wife. Wife filed a divorce complaint on July 2, 1997. In her complaint, Wife sought the equitable distribution of marital property, child support, alimony pendente lite, and counsel fees. Both parties were living in the marital residence at the time of the hearings before Master Patricia Miller on February 20, 1998 and March 3, 1998.

Wife is a teacher by profession. She graduated from the University of Dayton with a Bachelor of Science degree in Education in 1971. Wife received a Master of Education degree in Curriculum and Supervision from the University of Pittsburgh in 1975. Wife has not been employed as a teacher since 1977. During the parties' marriage, Wife has been involved in extensive volunteer activities in the area of fundraising. Wife also managed a lawn equipment business for two years beginning in 1988.

At the time of the hearings in this matter, Wife had completed one year of law school at Duquesne Law School, but was dismissed because her grade point average had fallen below the minimum acceptable standards set by the school. She subsequently applied to the University of Pittsburgh Law School. At the time of the hearings before the master, Wife had not yet been accepted for admission to the University of Pittsburgh's Law School.

Husband is a partner in a Pittsburgh law firm. Husband's gross income in 1997 was $371,901. In calculating the support award, the hearing master found Husband's net income to be $18,047 per month and attributed an earning capacity of $2,320 per month to Wife. The master recommended that Wife receive $500 per month plus $1,200 rental income as long as the parties resided together, and that Wife receive $12,500 per month with Husband to directly pay the costs of the marital real estate, life insurance policies, the children's tuition, and health insurance as soon as the parties occupied separate residences.

The $12,500 per month support award was contingent on Wife remaining the primary custodian of the parties' children. Husband was to pay preliminary counsel fees of $5,000. Husband filed exceptions to the recommendation and Wife filed timely cross-exceptions.

By order dated December 31, 1998, the trial court sustained some of the exceptions. The court found Husband's net income to be $16,400, Wife's earning capacity to be zero, and her rental income to be $700. The court ordered Husband to pay $10,400 per month and declined to make the order retroactive. Both parties filed motions for reconsideration. By order dated January 28, 1999, the trial court granted reconsideration of both parties' motions. However, on April 9, 1999, the trial court denied reconsideration and directed that its December 31, 1998 order stand as entered. Wife appealed and Husband cross-appealed. By order dated June 2, 1999, this court consolidated the appeals.

Wife raises the following issues for our consideration:

I. Is husband's contribution to his retirement plan "non-voluntary" so as to reduce his support obligation?

II. Did the trial court err in failing to consider the tax consequences of the support order?

III. Did the trial court apply the correct tax rate to calculate Husband's net income?

IV. Did the trial court err in failing to make the support order retroactive?

V. Did the trial court err in refusing to award preliminary counsel fees?

Wife's Brief at 7.

Husband raises the following issues for our consideration:

I. Whether the trial court exercised manifestly unreasonable judgment when it made an

award of child support and APL to Mother and one child which resulted in Mother's share of the total net monthly income being sixty-five percent and Father's share being thirty-five percent.

II. Whether the trial court erred by violating the rights guaranteed to Father by the Due Process Clause in the United States Constitution and the Commonwealth of Pennsylvania Constitution and also violated the Pennsylvania Divorce Law when it made an advance on equitable distribution to the Mother of three real properties without notice to the parties, without the parties being present, and without taking testimony or otherwise having an evidentiary hearing.

III. Whether the trial court exercised manifestly unreasonable judgment when it gave Mother an earning capacity of zero.

Husband's Brief at 1.

At the outset, we not that our scope of review with respect to assessing the propriety of support awards is a narrow one: the amount of support awarded is largely within the sound discretion of the trial court whose decision will not be disturbed absent a clear abuse of that discretion. Calabrese v. Calabrese, 670 A.2d 1161, 1162 (Pa. Super. 1996). Appellate review of an alimony pendente lite award is similarly gauged by an abuse of discretion standard. Jayne v. Jayne, 663 A2d 169, 176 (Pa. Super. 1995).

Wife first argues that Husband's $20,000 annual 401(k) contribution is neither non-voluntary nor a condition of his employment and, therefore, should not reduce his support obligation. According to the Pennsylvania Support Guidelines, the amount of support to be awarded is based in large part upon the parties' monthly net income. Pa.R.Civ.P. 1910.16-5(b). Monthly net income is determined by subtracting, among other things, non-voluntary retirement

payments. Rule 1910.16-5(b)(2). The trial court determined that the $20,000 annual payment was a non-voluntary contribution. The court reasoned:

> The facts are that two years before the parties separated, Father's law firm's management committee voted to require that mandatory contributions be made to the firm's retirement fund. In accordance with this dictate, Father was required to contribute $20,000. While Father had one of the votes establishing this mandatory contribution, he, by no means, controlled this decision. Moreover, the decision was made while the parties were married and living together. Accordingly, Father's contribution of $20,000 was a non-voluntary contribution to a retirement plan, and should have been deducted from Father's gross income for support purposes. See Pa.R.C.P. No. 1910.16-5(b)(2). The other $9,500 contribution by Father was voluntary, and therefore was properly included in Father's income.

Trial court opinion, 12/31/98 at 2. We find no abuse of discretion here.

Next, Wife argues the trial court erred in failing to consider the tax consequences of the unallocated support order. Wife complains the budget she submitted listing her living expenses did not include the payment of income taxes. Unallocated spousal and child support payments are considered taxable income to the recipient and are deductible to the payor. Holland v. Holland, 663 A.2d 768, 770 (Pa.Super. 1995); Pa.R.Civ.P. 1910.16-5(f). Wife contends that because she will have to pay income tax on the support award, the taxes are a reasonable need of hers and should have been taken into account by the trial court.

Admittedly, the trial court did not mention the tax consequences of the award in his opinion. However, this omission is not fatal. Rule 1910.16-5(f) does not require that the court consider the income tax ramifications of an unallocated support order. While the rule speaks of income tax considerations being an important factor to parties in

higher income brackets, the rule does not require that an award be made only after the consideration of income tax. The rule only states that the trier of fact should utilize the guidelines which result in the greatest benefit to the obligee. Instantly, the trial court awarded 65% of Husband's net salary to Wife and one minor child. We believe Wife's needs have been considered, and if she requires additional money for the payment of income taxes, she will have to adjust her expenses. We will not disturb the trial court's determination.

Next, Wife argues Husband's income was understated because the wrong tax rate was applied. Wife is claiming that Husband's net income should have been increased by approximately $10,000 per year because it was within his power to reduce his taxes by that amount. Wife maintains that since she filed her affidavit of consent to entry of a divorce on December 2, 1997, if Husband had then filed his consent, the parties could have been divorced before the end of 1997. Wife claims Husband would have been able to file his taxes as "single" rather than "married, filing separately," which would have resulted in considerable tax savings to Husband. We reject this argument.

Husband is under no requirement to quickly sign an affidavit of consent so that the parties can divorce. 23 Pa. C.S.A. 3301. Moreover, it is sheer speculation on Wife's part to even think that the trial court would grant a divorce when the parties were still living in the marital residence. Also, the question of whether the parties could have reached an agreement on the conditions of a divorce that would have preceded equitable distribution is highly unlikely.

Next, Wife argues the trial court erred when it failed to make the support order retroactive. Procedurally, Wife filed her divorce complaint in which she sought support in July of 1997. Hearings were held in February and March 1998. The hearing master filed her recommendation on March 18, 1998. A final order was entered on December 31, 1998 in which the trial court denied wife's request to make the support award retroactive to July 1997. Wife argues the

order should be retroactive because once she informed Husband of her intention to divorce, he stopped depositing his paycheck into the joint account from which Wife had paid household bills. Thereafter, Wife claims Husband only paid certain bills. The record belies Wife's claims.

> Husband's counsel: Mrs. Bosick, up to this date you will acknowledge, will you not, that your husband has been paying all of the expenses of the household for yourself and the children?
> Wife: He has been paying since we requested;
> Q: He is paying all of the expenses attributable to the mortgages?
> A: Those are paid.
> Q: Utilities?
> A: Those are paid.
> Q: Food?
> A: That's paid.
> Q: Maintenance of the household?
> A: That's paid.
> Q: Children's tuition?
> A: That's paid.
> Q: Insurance?
> A: That's paid.
> Q: Automobile expenses?
> A: That's paid. There are some auto expenses on my credit card.
> Q: Ms. Wilder testified that [Husband] made a change back in June by not putting money into the account and instead started paying your bills directly?
> A: That's correct.
> Q: But he has been paying all the bills that have come into the household attributable to maintaining the house, hasn't he?
> A: The house, yes.

Q: And he has paid all the expenses attributable to the children; correct?
A: Not all.
Q: What has he not paid?
A: When it came time to buy clothing to start school, shoes, things like that, they are all on the credit card.
Q: They are on your credit cards?
A: Right
Q: Did you submit those to [Husband] for payment?
A: Some of them I did and some of them he paid, but not nearly all of them. And it started a lot of conflict in our home. The biggest blow-up we had was September 9, and that was over a twenty dollar haircut, so we quit asking for money.
Q: When you say 'we,' you mean you quit asking?
A: Well, they had asked him for twenty dollars, and he blew up at me and it scared them.
[Husband's counsel]: I move to strike that. He pays the children an allowance?
A. Yes.
Q: How much is that?
A: Brian gets twenty dollars a week, and Jenny gets ten. There are occasions where he has forgotten to pay them and I have had to fill in.
Q: He pays all the expenses for the Somerset property?
A: Yes.
Q: He pays all the expenses for the Aspinwall property?
A: Yes.
Q: He pays all the insurance for yourself, you and the children?
A: Yes.
Q: And all medical and dental expenses?
A: Correct.
Q: Now, he has been giving you $500 a month?
A: Correct.

Q: And you have been collecting the rent from the Aspinwall property?
A: Correct.
Q: And the Aspinwall property has no cost that you pay—
A: Correct.
Q: --out of the $1,200?
A: Correct.
Q: So you have had $500 a month, plus the $1,200 a month from the Aspinwall property?
A: Correct.

Notes of testimony, 2/20.98 at 14-17. Based on the above, Wife fails to demonstrate that the trial court abused its discretion in failing to make the support award retroactive and we will not disturb its ruling.

Last, Wife argues the trial court erred when it declined to accept the hearing officer's recommendation for payment of preliminary counsel fees of $5,000. The purpose of an award of counsel fees is not to punish one spouse or to reward the other. Nemoto v. Nemoto, 620 A.2d 1216, 1223 (Pa.Super. 1993), citing Hoover v. Hoover, 431 A.2d 337, 338 (Pa.Super. 1981). A showing of actual need must be made in order to justify an award for reasonable attorney's fees and expenses in a divorce action. Id. The award is made on a case-by-case basis. Dech v. Dech, 492 A.2d 41, 44 (Pa.Super. 1985).

Instantly, Wife admitted that she took $23, 000 in marital funds without Husband's knowledge. (Notes of testimony, 2/20/98 at 17-18). She testified that she used a portion of that money to retain counsel. The trial court, in denying Wife's request, found that "[Wife] had the financial resources to meet her counsel fees through either savings or marital property that she took at the time of separation." (Trial court opinion, 12/31/98 at 8). We are unable to say the trial court abused its discretion in denying Wife's claim for counsel fees.

We now turn to Husband's cross-appeal.

1 We begin by addressing Husband's second argument.

Husband argues the trial court violated his due process rights when it made an advance on equitable distribution to Wife of three real properties without notice to him. Apparently, this "advance on equitable distribution" occurred on May 26, 1998 at a conciliation conference. (Husband's Brief at 14).

In her reply brief, Wife argues that the May 26, 1998 interim order is not before this court and is not reviewable until final disposition of the case. Keefer v. Keefer, 741 A.2d 808 (Pa.Super. 1999). We agree. This issue is not properly before us; therefore, we are without authority to address it.

Husband also argues the trial court erred when it gave Wife an earning capacity of zero despite her education, training and experience. "An award of support must be fair, non-confiscatory, and attendant to the circumstances of the parties." Strawn v. Strawn, 664 A.2d 129, 132 (Pa.Super. 1995). The court must consider the parties' earning capacities in a support action. 23 Pa. C.S.A. § 4322(a). Regarding determinations of earning capacity, we do not define a party's earning capacity as an amount that the party could theoretically earn. Adams v. Adams, 563 A.2d 913, 916 (Pa.Super. 1989). Rather, we consider the amount that the person could realistically earn under the circumstances. Id. Factors to be considered include but are not limited to age, health, mental and physical condition, training, and amount of time during the marriage the party has been out of work. Goodman v. Goodman, 544 A.2d 1033, 1035-1036 (Pa.Super. 1988).

Here, the master assigned an earning capacity of

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3 We note that Wife filed a motion to quash Husband's cross-appeal. The motion was granted on August 31, 1999. Husband filed a motion for reconsideration and a motion to correct order. On September 23, 1999, this court rescinded the August 31, 1999 order and reinstated Husband's appeal.

$35,000 per year to Wife. The master discussed her reasoning as follows:

> Given that the wife has completed a significant portion (approximately 1/3) of her total law school education, if wife were, in fact, still attending law school, the Master would find it reasonable to give her no earning capacity, but that is not the case. Wife is not in school nor has she been accepted at any law school. Given wife's education (a BA in elementary education and a Master's degree obtained in 1975, as well as four semesters of law school) and her impressive skills demonstrated in a dazzling array of high-powered volunteer activities, particularly in the area of fund raising, she simply cannot be considered to have no earning capacity while she neither works nor goes to school. She testified that she has not sought employment because she is a full time mother, but that simply is not persuasive, given the fact that the parties' minor children are 17 and 13.

Master's recommendation, 3/18/98 at 2.

The trial court rejected the master's recommendation.

> We decline to accept this recommendation. First, the record fairly read makes it unclear whether Mother will or will not be accepted into law school at the University of Pittsburgh. We believe no earning capacity should be assigned pending that decision, and a reasonable time period thereafter. This will allow Mother the opportunity to plan her future intelligently and proactively. If she, in fact, is accepted, she will not have to choose between quitting a new position or completing law school. If she is not accepted, she will have a fair opportunity to seek appropriate employment in an orderly and appropriate manner. We note that notwithstanding Mother's volunteer activities, she has not held a paying job in decades. Accordingly, as of the date and time of this hearing, Mother should have been given an

earning capacity of zero.

Trial court opinion, 12/31/98 at 3.

We believe the trial court erred when it failed to assign an earning capacity to Wife. While at the hearings in February and March of 1998, Wife was not in law school. If, in fact, Wife had been accepted into the University of Pittsburgh's Law School, that would not have occurred until September 1998.

1 Therefore, from September 1997 through August 1998, Wife was not in school.5 During the course of the hearing, Wife was asked: "Is there any reason why you have not sought employment?" (Notes of testimony, 2/20/98 at 24). She answered: "I consider myself a full time mother. I always have." (Id.)

In White v. White, 313 A.2d 776, 780 (Pa.Super. 1973), wife, who had not been employed during the marriage, sought support from husband. Wife argued she had an absolute right of support from husband. This court held that while wife may have a right of support from husband, that it not to say that she may sit back and refuse to obtain gainful employment, and expect full support to derive from the husband. Id. Moreover, the court stated, "Where a wife's dependency on her husband is voluntary, and not prompted by some justifiable reason such as poor health, a court should take her employability into consideration when fixing the order of support." Id. (Footnote omitted).

While there were no children involved in the White case, we are aware that instantly the parties have a daughter who was 13 years old at the time of the hearings in 1998.

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4 Husband's brief indicates Wife was accepted into the University of Pittsburgh Law School.(Husband's brief at 3).
5 During the summer of 1997, Wife took a course at the Duquesne Law School. (Notes of testimony, 2/20/98 at 7). In doing so, Wife thought it might help her gain re-admittance to the law school. (Id. at 7-8).

Wife was specifically questioned about her availability to work while the child attends school. Wife testified the child leaves at 7:00 a.m. and returns at 4:10 p.m. (Notes of testimony, 2/20/98 at 26). Wife was then asked how working during the day would interfere with her daughter's routine. Id. Wife responded that her daughter had some problems at the beginning of the school year and because she attends a private school she is off quite a few days due to holidays, a break in March, as well as summer vacation. (Id. at 26-27). We are not persuaded that Wife cannot work because she has to take care of her teenage daughter who is in school all day for nine months out of the year, and has occasional school holidays and a summer vacation.

In Commonwealth ex rel. Simpson v. Simpson, 430 A.2d 323 (Pa.Super. 1981), appellant/wife complained the trial court abused its discretion when it assigned an earning capacity to her. Additionally, Wife argued that appellee/husband produced no evidence regarding the availability of jobs or salaries for such jobs. Wife had no serious illnesses and possessed a college degree. There were no minor children involved. In affirming the trial court's attributing wife with an earning capacity of $400 per month, our court looked to the White case:

> In determining whether a wife is employable, the court should take into consideration the amount of time that a wife during her marriage has been out of work. If a wife has been a housewife during all or most of a marriage, relegating the 'bread-winning' role to the husband, that is a relevant factor. Certainly, a woman who has been off of the 'job market' for a considerable period of time may have a more difficult time in obtaining employment than a woman who possibly terminated her employment shortly before the support proceedings or after the separation. Employability, after all, means more than just the availability of work, the relative skills of the worker, the health and stamina of the worker, and the absence of children in the home for which the wife would have responsibility. A court should consider

ali[illegible] above factors and measure those elements with the duration of the unemployment experienced by the wife. Simpson, *supra* 430 A.2d at 326, *quoting* White, supra 313 A.2d at 780 n.5.

In Strawn v. Strawn, supra, wife had not worked during her 16-year marriage. On that basis, the master concluded that no earning capacity would be assessed against her. Wife's age, health, mental and physical condition, or any training she might have received were not considered. We determined the evidence was not sufficient to support the conclusion that wife had no earning capacity in the absence of the court's consideration of all of the factors relevant to that determination.

Instantly, except for a two-year stint in the lawn equipment business, Wife has not been employed since 1979. However, we cannot say that Wife, because she has not held a paying job, is so far removed from the workforce that it is not feasible that she could readily gain paid employment. Wife's own testimony presents a picture of a successful woman who sought a position on a school board, ran her own campaign, and won. She also was involved in various fundraising activities and because of her own success was sought after by other organizations. It seems clear to us that Wife did not need to complete law school to have an earning capacity. Based on Wife's education and varied experience, she already had one.

We reiterate that at the time of the hearings in February and March 1998, Wife was not in law school. Husband's brief informs us that Wife was accepted at the University of Pittsburgh's Law School and is expected to graduate in 2000. See Husband's brief at 3. Obviously, this is not a matter of record before this court. On remand, having already stated that it was error not to have assigned Wife an earning capacity at the time of the hearings, we leave it to the trial court's discretion to determine the appropriate calculation.

Because we are remanding this matter for the assignment of an earning capacity to Wife, we do not need to address Husband's claim that the court erred in attributing 65% of his income for support. That percentage should be lower after consideration of Wife's earning capacity.

For the reasons stated above, we reverse in part the order of the trial court and remand for proceedings consistent with this Memorandum. Jurisdiction relinquished.

/s/ Eleanor R. Valecko, Deputy Prothonotary

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Nos. 666 & 667 WAL 2000

MARY ELLEN BOSICK *Pro se*,
Petitioner,

v.

JOSEPH J. BOSICK,
Respondent

Petition for Allowance of Appeal from
Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 2nd day of April, 2001, the Petition for Allowance of Appeal is denied.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

FAMILY DIVISION

MARY ELLEN BOSICK,
Plaintiff,
v.
JOSEPH J. BOSICK,
Defendant.

FD 97-009496-006

ORDER
Eaton, J. April 9, 2002

AND NOW, this 9th day of April 2002, it is hereby ORDERED that Defendant's Application to seal the Record is granted. It is further ORDERED that no one other than the parties, their attorneys, or Court personnel are authorized to gain access to the legal papers filed in the above-captioned case.

BY THE COURT:
Kim Eaton /s/ J.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

FAMILY DIVISION

MARY ELLEN BOSICK,
Plaintiff,
v.
JOSEPH J. BOSICK,
Defendant.

FD 97-009496-006

OPINION AND ORDER
Eaton, J. April 10, 2002
FINDINGS OF FACT

I. General

1. The Plantiff, Mary Ellen Bosick (Wife), and the Defendant, Joseph J. Bosick (Husband), were married on April 6, 1974. Wife is 52 years old, and Husband is 55 years of age, at the time of this Order.

2. Wife filed a Complaint for Divorce on July 2, 1997. A Decree in Divorce was issued on December 29, 2000.

3. The date of separation is April 1, 1998, the date that Husband left the marital residence. This was a stipulation of the parties.

4. Three children were born of the marriage; two have reached the age of majority; and Jennifer is a senior at Oakland Catholic High School.

5. Husband is a partner in the law firm of Pietragallo, Bosick & Gordon (PB&G). He currently has a 6.3% interest in the partnership. PB&G currently has 19 equity partners. On December 31, 1998, Father had an 8.2% interest in the partnership.

6. Wife graduated from the University of Dayton with a Bachelor of Science degree in Education in 1971. She

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6. Wife graduated from the University of Dayton with a Bachelor of Science degree in Education in 1971. She

received a Master of Education degree in Curriculum and Supervision from the University of Pittsburgh in 1975. Mother graduated from the University of Pittsburgh School of Law in June of 2000, and is licensed to practice law in Pennsylvania. Wife acquired employment as an attorney on September 10, 2001. At that time, the parties stipulated that Wife was working 30 hours per week at $10 per hour.

7. Wife was employed as a teacher in the Fox Chapel School District from 1972 until 1977. She was on the Fox Chapel School Board from 1983 to 1987. She has been involved in extensive volunteer activities, and managed a lawn equipment business for two years beginning in 1988.

8. At the time of trial, Wife resided with daughter, Jennifer, in the marital home located in Fox Chapel, Pennsylvania. Jennifer is 17 years old.

9. Husband lives in a rental property in the City of Pittsburgh.

10. On May 21, 1998 at a Conciliation Conference, Judge Max Baer made an advance on equitable distribution to Mother of the following real properties:

(1) Fox Chapel marital residence;
(2) Aspinwall duplex; and
(3) Shaler house.

Husband objected to the advance.

11. Judge Baer also granted Wife's request that the Court award her the marital portion of party's Seven Springs condominium, which had been owned jointly with Husband an another couple. Wife purchased the Seven Springs condominium on December 9, 1998, using funds obtained from voluntarily refinancing the Fox Chapel marital residence on November 24, 1998. Wife used a portion of the proceeds from the refinancing of the marital home to pay off the mortgage on Seven Springs and to buy out the other couple's equity interest in the property.

12. Wife has full title to the Seven Springs Condominium.

13. The November 24, 1998 refinancing by Wife resulted

in a $375,000 mortgage on the Fox Chapel marital residence.

14. The parties stipulated that on April 1, 1998, the mortgage on the Fox Chapel marital residence was in the amount of $160,403, with an additional $14,149 line of credit obligation, leaving a net equity of $240,448.

15. In December 2000, Wife borrowed $120,000 which resulted in a new mortgage on the Seven Springs condominium.

16. After filing for divorce, without giving notice to Husband, Wife borrowed $50,000 from Fidelity Bank on March 4, 1998, which resulted in a $50,000 mortgage on the Aspinwall duplex. Prior to the aforesaid loan, there were no liens on the Aspinwall duplex.

17. On December 3, 1998, Wife borrowed $112,000, which resulted in a new and larger mortgage on the Aspinwall duplex, with a pay-off on the March 4, 1998 $50,000 mortgage.

18. The $375,000 refinancing of the Fox Chapel marital residence, the $112,000 loan with the Aspinwall duplex as collateral, and the $120,000 loan with Seven Springs as collateral are not marital debts.

19. Wife now owns solely in her own name 4 pieces of real property—the Fox Chapel marital residence, the Aspinwall duplex, the Shaler house, and the Seven Springs vacation condominium.

20. Husband does not own any real property.

21. Husband has no liquid assets apart from the fixed draw from his law firm.

22. On December 30, 1998, Judge Baer awarded Wife $10,400 in unallocated child support and APL based on Husband's $16,400 monthly net income (for calendar year 1997). The award was retroactive to April 2, 1998, the day after separation.

23. In addition to the $10,400 per month awarded to Wife, Judge Baer also awarded Wife the monthly net rental income from the Aspinwall duplex in the amount of $700. Thus, wife was awarded $11,100 per month.

24. Wife appealed Judge Baer's support and APL award to the Superior Court of Pennsylvania on May 6, 1999. At the time of appeal, the Equitable Distribution was scheduled to take place before Judge Baer on June 16, 1999. When Judge Baer determined to proceed with the Equitable Distribution despite the appeal, Wife filed an Emergency Application with the Superior Court to stop the Equitable Distribution trial which was granted.

25. Husband filed a cross-appeal to the Superior Court of Pennsylvania.

26. On August 4, 2000, the Superior Court ruled against Wife on all issues that she raised on appeal, and ruled in favor of Husband on his cross-appeal. It remanded the case to the Trial Court for an assignment of an earning capacity for Wife, but did not rule upon Husband's claim that the trial court erred in attributing 65% of the 1997 total net monthly income to Wife, stating that the percentage should be lower after the trial court gives wife an earning capacity. The Superior Court also ruled that the Husband's argument that the Trial Court violated his constitutional rights when it made an advance on equitable distribution to Wife of three real properties without notice to the parties, without the parties being present, and without taking testimony or otherwise having an evidentiary hearing would not be decided because Judge Baer's May 26, 1998 Order was an interim Order.

27. On August 17, 2000, Wife filed an application for Reargument before the Superior Court en banc, which was denied on October 17, 2000.

28. On November 13, 2000, Wife filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, which was denied on April 2, 2001.

29. The monthly net earning capacity of Wife is as follows:

(1) Year 1998: $2320 per month.

The hearing officer originally determined that Wife had a $35,000 annual earning capacity. Although Judge Baer

granted Wife's exception and found that Wife had no earning capacity, this finding was reversed by the Superior Court. As such, this Court must attribute an earning capacity to Wife. Wife did not return to law school until after 1998. This Court finds that the earning capacity originally found by the hearing officer to be reasonable and attributes that amount to Wife for the year 1998.

(2) Year 1999: $300 per month.

Wife returned to school in 1999 and graduated in 2000. For 1999, the Court finds that Wife had a minimal earning capacity during that time, annualizing any summer earning and attributing at least a part time earning capacity during the school year. The court finds her earning capacity to be $300.

(3) Year 2000: $300 net per month

Although Wife graduated in May 2000, in order to acquire her law degree she had to study for and pass the bar exam. The Court believes that Wife diligently searched for employment during that time and declines to assign any additional earning capacity during the year 2000. As such, her earning capacity for the year 2000 shall be $300.

(4) Year 2001: $2320 net per month.

The Court finds that Wife diligently searched for legal employment in the year 2001; however, she was unsuccessful until September 2001. Nevertheless, the Court finds that Wife could have acquired non-legal employment during the 9 months following graduation while she continued to look for employment. The Court declines to assign an earning capacity of $45,000 as requested by Husband. Instead, the Court assigns the original "non-legal" earning capacity found by the hearing officer in 1998 to Wife - $35,000 per year or $2320 net.

30. Wife received $700 net rental income from the Aspinwall duplex; however, refinancing after December 1999 negated that amount as a net income receipt.

31. Wife's monthly net income, Wife's monthly net earnings capacity, is as follows:

1998: $3020 ($700+$2320=$3020)

1999: $1,000 ($700+$300=$1,000)
2000: $300
2001: $2320

32. Husband's net monthly earnings are as follows:
1998: $12,356
1999: $11,047
2000: $12,343
2001: $12,343

33. Although wife argued at trial that the Court should not assume that Husband's retirement contribution was mandatory on an ongoing basis, no evidence was presented that it was not.

34. Support should be calculated as follows:
4/1/98 to 1/19/99: $9215 per month; $88556
1/20/99 to 12/31/99: $4171 per month; $47,495
1/1/00 to 12/31/00: $4900 per month; $58,800
1/1/01 to 9/1/01: $4635 per month; $37,080
Total: $231,931

35. Direct payments made by Husband. The stipulated date of separation is April 1, 1998. As such, Husband was in the home for one fourth of 1998. Based upon Husband's request for credit on arrearages, he should receive the following credit:

a. Three quarters of real estate taxes or 75% of $4146.00 $3109
b. All requested payments on fire insurance and utilities. $492
c. All requested payments on utilities: $83
d. 40% of IRS payment: $2071.
Total: $5,755

36. The party's minor child attends Oakland Catholic. Prior to the modification, the tuition was included in Wife's APL/child support payment. With the above reduction in APL/support, this is no longer true. Husband shall therefore be responsible for the sum of $12,450, which Mother alleged was taken from the daughter's account to pay for schooling.

37. For the same reason, the court denies Husband's

request for reimbursement of $2370 of tuition paid prior to that time.

38. Husband also failed to make certain payments as required by Judge Baer's Order of December 1998. Specifically those amounts are:

(1) Life insurance for the children: $17,055
(2) Kemper Midland (H): $1,512
(3) General American Life Policies: $25,890
(4) Total: $44,457

39. Although Wife's expert simply stated that Husband's failure to make the above payments was in violation of the Court Order, some further inquiry may be necessary. The hearing officer's recommendation required that Husband maintain these payments; however, this finding was not disturbed by any subsequent order, and therefore must stand.

40. Husband made the following payments:

(1) Father's payments to family division or PA SCDU:
    i. 1998: $78,300
    ii. 1999: $99,120
    iii. 2000: $96,485
    iv. 1/1/01 to 4/5/01: $23,850
    v. 4/5/01 to 9/1/01: $36,793
(2) IRS Intercept from Father
    i. 1999: $2,788
    ii. 2000: $14,733
(3) Credit owed to Husband: $5,755
(4) Total payments: $357,824

41. In addition to the total amount owed pursuant to paragraph 34 ($231,931), Husband owed an additional sum of $56,907 pursuant to paragraph 36 and 38 for a total amount owing of $288,838.

42. Husband made overpayment to Wife of Combined Child Support and APL in the amount of $31,994 as of September 1, 2001, as follows:

(1) Amount paid by Husband: $357,824
(2) Combined Support and APL obligation as

well as other payments owed: $288,838

(3) Amount of Husband's Overpayment: $68,986

43. The following items of Personal Property were owned by Husband prior to the marriage:

(1) Loveseat from Husband's apartment;

(2) Husband's coin collection

(3) Husband's 2-1/2 dollar gold piece received prior to marriage from Husband's father

(4) Seth Thomas clock from Husband's childhood residence

(5) Husband's piano that he received as a gift from his parents in 3rd grade.

44. The PB&G Partnership Agreement narrowly defines the rights of partners as follows:

(1) The Partnership Agreement restricts the right of partners to dissolve or liquidate the partnership. (Paragraph 14.1)

(2) The Partnership Agreement restricts the ability of a partner to sell, assign, transfer, mortgage, pledge, or otherwise encumber any part of his partnership interest. (Paragraph 12.3)

(3) The Partnership Agreement provides an amount to the partner if he voluntarily withdraws from the partnership, if he becomes disabled, if he dies, or if he retires. (Articles VII, VIII, IX and X of Agreement)

45. In Husband's case, and in the cases of the other Equity Partners, the partnership Agreement provides a clear Partnership interest value.

46. The Partnership Agreement reveals that Husband is not a majority or controlling partner and that Father is one of many Partners.

47. PB&G is an entity that is not publicly or privately traded.

48. The pool of potential buyers for Husband's partnership interest is limited to lawyers, for the law does not

permit a non-lawyer to have an ownership interest in a law firm.

49. Partners have left PB&G, and the amount received by the withdrawing partner was based on the terms of the Partnership Agreement.

50. Husband had an equity partnership interest of $60,000 on December 31, 1998.

51. Although Husband presented evidence that pursuant to the partnership agreement certain amounts should be deducted from the $60,000—specifically, his negative capital account, the Court declines to deduct this amount. The negative capital account fluctuates based upon any particular point in time and does not necessarily reflect actual amounts owed. As such, the Court finds that number to be arbitrary.

52. Husband is obligated to reimburse the PB&G under the Partnership Agreement by the amount of excess draws.

53. Husband's draw for 1996 exceeded the amount of his compensation for 1996 by $42,841.41. Father entered into an agreement obligating him to reimburse PB&G over a ten-year period. Husband is making monthly payments, which include principal and interest, in the amount of $475.63

54. The original debt was in the amount of $42,892. Husband has been paying on the debt since June 1, 1997. The payment schedule on the aforesaid debt shows the balance owed as of April 1, 1998 was in the amount of $35,892.81.

55. The $35,892.81 debt as of April 1, 1998 is a marital debt because the incurring of the debt preceded the date of separation.

56. The marital assets consist of the following:

(1) R/E Fox Chapel: $240,448 (equity)
(2) R/E Aspinwall: $150,000
(3) R/E Shaler: $85,000
(4) Seven Springs (1/2 interest): $29,639
(5) Insurance Policy—General American: $23,575
(6) Insurance Policy—General American:

$16,072

(7) Insurance Policy—General American: $1,825

(8) Insurance Policy—Midland: $2,116

(9) Retirement—Marital Component of 401K: $1,036,277

(10) Retirement—IRA: $206,903

(11) Retirement—IRA: $3,497

(12) Retirement—IRA: $24,381

(13) Jewelry—Wife: $13,750

(14) Jewelry—Husband: $3,250

(15) Household Goods—Wife: $24,626

(16) Household Goods—Husband: $375

(17) Auto—1997 Olds Achieva: $13,000

(18) Auto—1996 Jeep Cherokee: $21,000

(19) Dean Witter Account: $2,796

(20) Dean Witter Account: $61

(21) Willowbrook Country Club Membership Bond: $250

(22) PB&G Husband's interest at 12/31/98: $60,000

(23) TOTAL: $1,958,841

ORDER

AND NOW, this 10th day of April, 2002, it is hereby ORDERED, ADJUDGED AND DECREED after hearing testimony by both parties and their witnesses and considering all the evidence at a trial, the Court enters the following Order:

I. Husband's Petition for Modification

It is ORDERED that Husband's Petition for Modification is GRANTED. Based upon the incomes as stated in the foregoing Findings of Fact, as well as the calculations stated therein, Husband is entitled to a modification.

II. Re-calculation of Arrears

As calculated in the Findings of Fact, Husband has an overpayment through September 1, 2001 of $68,986. In light of the recalculation set forth above, it is further ORDERED

as follows:

Husband is not in arrears with respect to his child support and APL obligation; The Domestic Relations Section of Allegheny County is to advise the consumer credit bureau that Joseph J. Bosick has paid in full any and all support obligations. Any Orders of the Court that freeze the assets of Joseph J. Bosick are vacated.

III. Wife's Request for Fees and Expenses Resulting from Husband's Failure to Pay Full Support

In view of the determination that Husband overpaid support, Wife's request for counsel fees and other expenses resulting from Husband's failure to pay the full award of APL/Support is denied.

IV. Equitable Distribution

The Court has considered all of the relevant factors in making a division of marital property. The marriage was a lengthy one, Wife was a stay-at-home mother for many years, and although she recently returned to the work force, it is doubtful that, she will be about to reach the earning capacity of Husband. There is credible evidence, also, that Husband's law practice may never be as prosperous as it once was and that Husband is approaching his retirement years. Those factors, as well as others, dictate a 60/40 division in favor of Wife.

It is ORDERED that the marital property, as set forth in the Findings of Fact, be divided such that Wife receives (60%) sixty percent and Husband receives (40%) forty percent.

With regard to specific items of Personal Property, it is Ordered that Wife be awarded the following:
-Furniture and household goods: Furniture and household goods located in the marital residence except the specific items awarded to Husband as described below.
-Vehicle: 1997 Oldsmobile Achieva automobile

-Jewelry: Ladies gold bracelet; ladies engagement ring; earring jackets; earrings; tennis bracelet; Ring (diamond cluster design); pendant (diamond cluster design); pearls; bracelet (cultured pearl design)
-Whole Life Policies of Insurance: General American Policy No. 3231152; General American Policy No. 3231153; General American Policy No. 1989682; Midland Insurance Policy No. 670842.

With regard to specific items of Personal Property, it is ORDERED that Husband be awarded the following:
-Furniture and Household goods: The following items which are presently in the custody and control of Wife are to be delivered to Husband within 30 days of the date of this Order:

Husband's desk: $300
Husband's desk chair: $145
The Irish Hurling painting: $125
The Amsterdam painting: $300
Fifty Percent of all Waterford crystal, as mutually agreed: $400
Wedding present of photographs above living room fireplace given by Husband's cousin, Tom O'Dwyer, as a wedding gift $160
Wedding present of belique china given by Husband's Aunt $60.
Loveseat in living room that came from Husband's former apartment: $500
Fifty percent of family photographs as mutually agreed
Husband's coin collection
Husband's weights, dumbbells, benches, mirrors, speed bag and heavy bag $165
Stihl chain saw: $35
Some of Husband's tools, as mutually agreed
Husband's personal files
Pendant that contains the gold coin won by

Husband's Father in a grade school spelling contest $200; and
Seth Thomas clock from Husband's childhood residence: $50

***Husband is also awarded marital property over which he presently has possession.**

Vehicle: 1996 Jeep Grand Cherokee vehicle
Jewelry: Pendant with two and one-half dollar gold coin; Man's ring.

The Marital estate has been calculated at $1,958,841. Wife shall receive 60% of this amount or the sum of $1,175,304. From this we should deduct the following items which have been awarded to Wife.

Less R/E Fox Chapel: $240,448
Aspinwall: $150,000
Shaler: $85,000
Seven Springs: $29,639
General American: $23,575
General American: $16,072
General American: $1,825
Midland: $2,116
IRA: $24,381
Jewelry: $13,480
Household Goods: $22,136
1997 Olds Achieva: $13,000
Dean Witter Account: $2,796
Total: $624,468

From this amount we should also deduct 40% of the marital debt, which is $35,893 or $14,357, as well as the amount of Husband's overpayment as of September 1, 2001 of $68,986. This amount is calculated as follows: Wife's share: 1,175,305; Property in Wife's Possession: $624,468; Debt: $14,357; Overpayment: $68,986. Total Due: $467,494.

This amount shall be transferred to wife via QDRO from Husband's retirement funds.

The Court recognizes that the amounts in the retirement funds may have fluctuated because of market

conditions. Each party shall receive his or her percentage share of the gain or bear his or her percentage of the loss. Counsel for both parties are to calculate this amount and to make appropriate adjustments to the funds due to the Wife.

V. Alimony

The Court has carefully considered the factors for an alimony award and finds alimony to be appropriate for a short time in this case. Specifically, the Court had focused on the duration of the marriage, contribution to the increased earning power of the other party, the contribution of Wife as a homemaker and the fact that this is unlikely that Wife, given her age and the fact that she did not work during the marriage, will ever reach Husband's earning potential.

However, the Court also finds that Husband's income during the pendency of this action and possibly into the foreseeable future has and will decline from the years prior to separation. Wife, unfortunately, failed to cut back on various expenses and, in fact, incurred significant debt during the course of this action. Wife continues to maintain the Seven Springs Condominium and continues to reside in the Fox Chapel residence. The other trappings of the parties' previous lifestyle are similarly difficult to maintain, given Husband's decline in income, as well as the breakup of the marriage. As such, Wife's assertion that $10,000 per month is a reasonable need must fail.

Additionally, the party's minor child will soon be finishing high school and Wife's current need to maintain the marital home will cease to be a reasonable need. This is particularly true as the cost of maintaining this home, with its mortgages, taxes, maintenance, etc., is a large portion of Wife's budget. Wife has been receiving APL for almost 4 years, during which time she returned to school to acquire her law degree and during which time Husband paid additional funds because Wife had virtually no earning capacity.

Nevertheless, Wife is in need of a short period of alimony so that she can make the transition from a dependent

spouse with minor children to that of a single career woman. The Court therefore awards the sum of $2,200 per month in alimony until April 15, 2006. This amount shall be modifiable according to law. Alimony Pendente Lite terminates as of April 15, 2002.

Wife has just recently become employed and will need some time to build a law practice. Although this Court believes that Wife does not have time to ever reach Husband's earning potential, she should be able to eventually support herself through her own wages.

In the event, Wife appeals this decision, the order of APL is suspended pending resolution of this matter by the Superior Court. In the event the Superior Court reverses or remands the matter, this Court will consider lifting this suspension retroactive to the date of suspension.

In the event that Husband appeals this decision, any cross appeal by Wife will not be considered an appeal triggering suspension of the APL.

VI. Counsel Fees

Wife's Counsel fees were substantial in this case. However, despite Wife's claims that a large portion of these fees were incurred because of Husband's contempt, as was stated earlier, Husband actually overpaid support.

Further, as the Court indicated in its Findings of Fact, the Court believes that Wife has been overly litigious in this matter. Wife appealed the Court's initial support Order attempting to take the matter to the Pennsylvania Supreme Court. Although this in itself may be arguably appropriate, Wife attempted to delay resolution of the economic matters, including Husband's modification request, while requesting contempt hearings. Also, despite Wife's social prominence in the community, she opposed Husband's Petition to Seal the Record, giving no reasons for such opposition.

Additionally, Wife received substantial advances in this case and should have been able to pay counsel fees as the case progressed. As such, Wife's claim for counsel fees and

costs is denied.

VII. Child Support

Wife acquired employment in September 2001. Although the parties filed a stipulation indicating that Wife had acquired employment and indicated her hourly rate, the Court has no evidence of her actual income. Likewise, the Court has no evidence of Husband's final 2001 income.

The parties are directed to schedule a support hearing for the purposes of determining alimony and child support, based upon the parties' incomes. Any award shall be retroactive to September 1, 2001 and shall continue through April 15, 2002. After that time, the hearing officer shall calculate child support only, based upon the parties' incomes and Wife's alimony award.

Husband shall be responsible for payment of Jennifer's high school tuition until she graduates. Any overpayment/arrearages resulting from the hearing officer's recalculation of support shall be added/subtracted from the funds transferred to Wife from Husband's retirement fund.

VIII. Additional Claims

All other claims by the parties are dismissed.

This order shall be considered a Final Order of Court.
By the Court, /s/ Kim Eaton, Judge
Dated April 10, 2002

IN THE SUPERIOR COURT OF PENNSLVANIA

1522 WDA 2002
1544 WDA 2002

MARY ELLEN BOSICK *Pro se,*
Appellant,

v.

JOSEPH J. BOSICK,
Appellee.

BEFORE:
STEVENS, ORIE MELVIN AND CAVANAUGH, JJ.

MEMORANDUM **FILED February 12, 2004**

Mary Ellen Bosick (Wife) appeals and Joseph J. Bosick (Husband) cross appeals from the Order entered July 29, 2002 following reconsideration of the trial court's April 10, 2002 findings of fact and order which awarded Wife 60% of the marital estate, alimony through April 15, 2006, modified child support and denied Wife's request for counsel fees. Upon review, we affirm in part and reverse in part.

The facts and procedural history were accurately summarized by the trial court as follows:

Wife and [Husband] were married on April 6, 1974, separated on April 1, 1998, and divorced on December 29, 2000. At the time of trial, Wife was 52 years old and Husband was 55 years of age. Three children were born of the marriage. Two have reached the age of majority. Daughter Jennifer was a senior in high school at the time of trial and resided with Wife in the parties' marital home in Fox Chapel, Pennsylvania.

Wife earned a Bachelor of Science degree from the University of Dayton in 1971, a Masters of Education Degree in Curriculum and Supervision form the University of Pittsburgh in 1975 and a J.D. from the University of Pittsburgh in 2000. Wife was employed as a teacher in the Fox Chapel School District from 1972 until 1977. She was a member of the Fox Chapel School Board from 1983 to 1987. She managed a lawn equipment business for two years beginning in 1988. She acquired employment as an attorney on September 10, 2001 and is currently working thirty hours per week earning $10 per hour. Wife's monthly net income for support purposes was set at $[2,320] for 1998, $1,000 for 1999, $300 for 2000 and $2,320 for 2001. ... She has always been extensively involved in volunteer activities. Wife owns solely in her name the marital residence, a condominium at Seven Springs, a duplex in Aspinwall and a house in Shaler.

Husband is one of nineteen equity partners in the law firm of Pietragallo, Bosick and Gordon (PB&G). As of December 31, 1998, Husband had an 8.2% interest in the partnership. At the time of trial, his percentage was 6.3%. His net monthly earnings were $12,343 in 2000 and 2001. This is a substantial reduction in income of five years earlier. His draw in 1996 exceeded the amount of his compensation for that year by $42,841.41. Husband is obligated to reimburse PB&G by that amount in monthly installments of $475.63 over ten years. Husband's monthly net income for purposes of support was found to be $12,356 for 1998, $11,047 for 1999, $12,343 for 2000 and $12,343 for 2001. Husband does not own any real property. Husband has no liquid assets apart from the fixed draw from his law firm.

Based upon the respective monthly net incomes of the parties, Husband's support obligation from April 1, 1999 through September 1, 2001 was $231,931. Considering payments made by Husband, payments which Husband should have made and credits owed to him, Husband was overpaid to Wife for combined child support and APL in the amount of $31,994 as of September 1, 2001.

By Order dated April 10, 2002, this court granted Husband's request for modification of child support, denied Wife's request for counsel fees as sanctions for Husband's failure to pay support, awarded Wife 60% of a marital estate valued at $1,958,841, awarded alimony to Wife of $2,200 per month through April 15, 2006 and denied Wife's claim for counsel fees and costs. Included in the marital estate and awarded to Wife were three General American life insurance policies with a cash surrender value of $41,472. Both parties presented motions for reconsideration, which were granted. By Order dated July 29, 2002, the court changed the value of one asset and denied all other issues raised by the parties on reconsideration. [Wife] timely appealed and [Husband] cross-appealed.

Trial Court Opinion, 1/8/03 at 1-3.

Wife presents four questions for our review:

I. Whether the trial court, by misapplication of law or failure to follow proper procedure, abused its discretion in listing and valuing marital property "absent" competent and/or "contrary" to record evidence.

II. Whether the trial court erred in finding that self-employed Appellee's 401k contributions were non-voluntary.

III. Whether the trial court, under the facts sub judice, exceeded its authority in suspending Appellant's alimony pendent elite during the pendency of the parties' cross appeals.

IV. Whether the judgment exercised by the trial court was manifestly unreasonable in failing to award equitable counsel fees to Appellant.

Wife's brief at 3.

At the outset, we recognize that Wife raises a series of claims in her brief in a section entitled, "Appellant First Takes Exception With the Validity of the Court Orders Below." Wife's Brief at 9. We find the issues raised therein

were not included in Wife's 1925(b) statement and are, therefore, waived. See Commonwealth v. Lord, 553 Pa. 415, 719 A.2d 306 (1998)(finding issues not raised in the 1925(b) statement are waived); Chen v. Chen, 2003 PA Super 497 (Filed December 19, 2003)(finding that the holding in Lord has been applied to family law cases).

Turning to Wife's claims, she first argues that the trial court erred in including the cash surrender value of three General American life insurance policies as marital property. She argues that she placed the policies in an irrevocable trust for the benefit of the children, and she served as the trustee. Wife's brief at 13-14. Although Husband agrees the parties stipulated to the cash surrender value of the policies, he claims he never stipulated to the existence of an irrevocable trust for the benefit of the children. Husband's brief at 18-19.

"Our review of an equitable distribution order is limited as such awards are within the sound discretion of the trial court, and will not be disturbed absent an abuse of discretion." Anderson v. Anderson, 822 A.2d 824, 827 (Pa. Super. 2003)(*citing* Fishman v. Fishman, 805 A.2d 576, 578 (Pa. Super. 2002)). "An abuse of discretion will be found by this Court only if the trial court failed to follow proper legal procedures or misapplied the law." Id. The finder of fact is entitled to weigh the evidence presented and assess its credibility. Williamson v. Williamson, 586 A.2d 967, 972 (Pa. Super. 1991). "The fact finder is free to believe all, part, or none of the evidence and the Superior Court will not disturb the credibility determinations of the court below." Fonzi v. Fonzi, 633 A.2d 634, 637 (Pa. Super. 1993).

The definition of marital property includes "all property acquired by either party during the marriage." 23 Pa. C.S.A. § 3501(a). However, the parties can exclude certain property as marital by valid agreement. 23 Pa. C.S.A. § 3501(a)(2); see Robbins v. Kristofic, 643 A.2d 1079 (Pa. Super. 1993), *appeal denied,* 539 Pa. 654, 651 A.2d 541 (1994) (where parties agreed an irrevocable trust was established exclusively for the use and benefit of the children

rather than as marital property).

In the present case, Wife testified that in 1993 she placed the policies in trust for the benefit of the children. See N.T. Trial, 4/4/01, at 317. However, the trial court specifically found that no written trust document was produced at trial to support Wife's claim. Trial Court Opinion, 1/8/03, at 5. The trial court also determined that no evidence was produced establishing the assets were used exclusively for the children. Id. Therefore, because Wife was the named beneficiary on the policies, the trial court determined the cash surrender value of the policies was marital property which was ultimately awarded to Wife.

Wife contends that Husband admitted that the insurance policies were transferred to a trust. Wife's brief at 14, footnote 3. In support of her claim Wife references a single page of the Reproduced Record. R.R. at 46a. Upon review of the certified record in this case, we have determined that Wife appears to be relying on Husband's Petition for Modification and Corresponding Motion for Credit on Arrearages filed on January 29, 1999. See C.R. at 81, p.4. Wife claims that in that filing, Husband conceded that he created a deed of trust with Wife in July 1993 and transferred the insurance policies to the trust with the trust as beneficiary. Id.

In the present case, the trial court relied on the evidence presented at the April 4, 2001, April 5, 2001 and June 27, 2001 hearings and determined that neither trust documents nor other evidence was produced at trial to support Wife's claim. Since Wife is referencing Husband's 1999 filing for the first time on appeal, we find no abuse of the trial court's discretion in determining the insurance policies were marital property.

Wife next contends that the trial court erred in determining that a portion of Husband's contributions to his 401(k) plan were non-voluntary and, therefore, excludable for purposes of determining his net monthly income. Wife argues that the non-voluntary contributions should be

included as part of Husband's net income because he can borrow from the pension plan without penalty. Wife's brief at 17.

It is well settled that the trial court must include any voluntary contributions that a party makes to his retirement plan as income for support purposes. Portugal v. Portugal, 798 A.2d 246 (Pa. Super. 2002). However, non-voluntary contributions are excludable. Id.

In terms of background information, it appears that on March 18, 1998, the hearing officer accepted Wife's argument that all of Husband's contributions to the pension plan were voluntary. As such, the hearing officer included all of Husband's contributions as income in its recommendation. However, by order entered December 31, 1998, the trial court overruled that portion of the hearing officer's decision and determined that there was a mandatory component as well as a voluntary component. Trial Court Opinion, 12/31/98, at 2. Specifically, the trial court determined that the Husband's $20,000 payment was a non-voluntary contribution and should have been deducted from his gross income and that his $9,500 contribution was voluntary and properly included in his income. Id. Wife appealed, and a panel of this Court agreed with the trial court that the $20,000 contribution was non-voluntary and should have been deducted from Husband's gross income for support purposes. See Bosick v. Bosick, 764 A.2d 1117 (Pa. Super. 2000) (unpublished memorandum), appeal denied, 565 Pa. 634, 771 A.2d 1276 (2001).

Upon review, Wife appears to be raising the identical issue which was previously litigated before a panel of this Court. Because the trial court determined that Wife did not present any further evidence on the amount or nature of Husband's mandatory contributions, we need not revisit this issue in this appeal. Trial Court Opinion, 1/8/03, at 4. With respect to Wife's assertion that Husband can borrow from his plan without penalty, she fails to cite to any case law or statutory law requiring Husband to do so. Accordingly, we

find her claim must fail. Next, Wife argues the trial court should not have suspended her alimony pendent elite (APL) payments during this appeal because a divorce is not final for purposes of APL until all appeals are exhausted. She claims her right to appeal must be equitably protected, particularly since she received almost no liquid assets.

An appellate court's standard of review for awards of alimony pendent elite (APL) is well settled. If the order is bolstered by competent evidence, the order will not be reversed absent an abuse of discretion. Isralsky v. Isralsky, 824 A.2d 1178, 1188 (Pa. Super. 2003). APL is allowable to either spouse during pendency of a divorce action. 23 Pa. C.S.A. § 3702.

The obligation to pay alimony pendente lite continues following the entry of the bifurcated divorce decree until all economic issues have been resolved. This court has held that this obligation continues even after the entry of a final decree in equitable distribution when an appeal remains pending and terminates only after all litigation has ended. We have also held, however, that alimony pendent elite may be terminated before the litigation is concluded where the recipient has acquired assets or income which sufficiently equalizes the financial ability of the parties to pursue the action. Jayne v. Jayne, 663 A.2d 169, 176 (Pa. Super. 1995)(citations and footnote omitted).

Pursuant to the trial court's April 10, 2002 Order, Wife was awarded alimony in the amount of $2,200 per month, and APL was terminated as of April 15, 2002. However, the trial court indicated that APL would be suspended in the event that Wife filed an appeal from the trial court's order. The trial court did not disturb this finding on reconsideration. Order, 7/29/02. In its opinion, the trial court stated:

As previously discussed, Wife has sufficient assets and income available to her through equitable distribution, alimony and her own earning capacity that she can litigate the case as she chooses. Wife received the sum of

$1,175,304 in equitable distribution. Wife has been receiving APL for almost four years, during which time she returned to school to acquire her law degree and during which time Husband paid additional funds because Wife had virtually no earning capacity. She was awarded alimony of $2,200 per month through April 15, 2006. She is currently employed as an attorney. Although Wife's income is less than that of Husband, Wife nonetheless has sufficient assets to equalize her financial position and allow her to pursue this litigation on par with Husband.
Trial Court Opinion, 1/8/03, at 7-8.

Upon review, we find Wife has adequate assets and income available to her through equitable distribution, alimony and her earning capacity so that she could further litigate this matter as she chooses. Nemoto v. Nemoto, 620 A.2d 1216, 1221-1222 (Pa. Super. 1993). Finally, Wife claims she should have been awarded counsel fees because she received almost no liquid assets. She argues that the advance on equitable distribution came primarily in the form of real property, which had equity but produced little income. Although she concedes she received nearly one half million dollars in assets, she claims she derived little income from paying her counsel fees on an ongoing basis. Wife's brief at 23. She also focuses on the disparity in the parties' income and Husband's ability to pay. Id. at 25.

On review, we examine whether the court below abused its discretion. The purpose of an award of counsel fees is to promote fair administration of justice by enabling the dependent spouse to maintain or defend the divorce action without being placed at a financial [dis]advantage; the parties must be 'on par' with one another. Moreover, counsel fees are awarded only upon a showing of need.
Brody v. Brody, 758 A.2d 1274, 1281 (Pa. Super. 2000) (citations and quotation marks omitted); Anzalone v. Anzalone, 835 A.2d 773 (Pa. Super. 2003). "Counsel fees are awarded based on the facts of each case after a review of all the relevant factors." Perlberger v. Perlberger, 626 A.2d

1186, 1207 (Pa. Super. 1993), appeal denied, 536 Pa. 628, 637 A.2d 289 (1993). "These factors include the payor's ability to pay, the requesting party's financial resources, the value of the services rendered, and the property received in equitable distribution." Id.

In the instant case, the trial court rejected Wife's claim for attorney's fees finding that she failed to demonstrate the requisite need. Trial Court Opinion, 1/8/03, at 6. The trial court determined that Wife was awarded APL and received substantial advances in this case. The trial court further found that Wife was awarded sufficient assets through equitable distribution to pay her own counsel fees. Id. Although the trial court acknowledged that Husband continues to have a higher income than Wife, it found that Husband's ability to pay was not established in light of his declining income and significant expenses. Id. The trial court also specifically found that Wife's litigious approach caused a large portion of her fees. Id. at 6-7. Based upon our review, we conclude that the trial court did not abuse its discretion in denying an award of counsel fees to Wife.

Husband presents two questions for our review in his cross appeal:

I. Whether the trial court's refusal to reopen the record to allow evidence of the true market value of the marital residence was unjust, improper, and worked an unfair penalty on Husband.

II. Whether the trial court erred in reducing Husband's APL overpayment by the amount of life insurance premiums totaling $44,577, because the court had specifically made these payments a component of Husband's overall monthly alimony pendente lite obligation to Wife.

[. . .] sold the marital residence on December 18, 2001 for $550,000. The difference between the stipulated value and the sale price was $135,000. Upon the sale of the residence, Husband moved to reopen the record and introduce the sale

price or the actual market value of the marital residence. Wife opposed the motion, and the trial court denied Husband's request.

"In matters of equitable distribution, the trial court has broad equitable powers to effectuate economic justice between the parties and we will not reverse an award absent an abuse of that discretion." Marra v. Marra, 831 A.2d 1183, 1186-87 (Pa. Super. 2003), appeal denied, 563 Pa. 702, 761 A.2d 550 (2000). The Divorce Code does not specify a particular method of valuing assets. The trial court must exercise discretion and rely on the estimates, inventories, records of purchase prices, and appraisals submitted by both parties. Smith v. Smith, 653 A.2d 1259, 1265 (Pa. Super. 1995), appeal denied, 541 Pa. 641, 663 A.2d 693 (1995). Valuations should be made as close as possible to the property distribution date. Powell v. Powell, 577 A.2d 576, 583 (Pa. Super. 1990). In the present case, the parties stipulated to the value of the marital residence which was accepted by the trial court for purposes of equitable distribution.

A stipulation is a declaration that the fact agreed upon is proven. A valid stipulation must be enforced according to its terms. Parties may by stipulation resolve questions of fact or limit the issues, and, if the stipulations do not affect the jurisdiction of the court or the due order of the business and convenience of the court they become the law of the case. Osial v. Cook, 803 A.2d 209, 216 (Pa. Super. 2002)(citation omitted).

In denying Husband's request to reopen the record, the trial court relied on Stinner v. Stinner, 446 A.2d 651 (Pa. Super. 1982). There, a panel of this Court found that absent fraud or overreaching, the trial court should have accepted appellee's stipulation which was concurred in by appellant regarding the actual amount in controversy which was subject to garnishment. In the present case, the trial court determined that Husband was bound by the stipulated value of the marital residence since he failed to introduce any

evidence of fraud or overreaching. Trial Court Opinion, 1/8/03, at 9-10. Unlike Stinner, Husband contends he mistakenly entered into the stipulation. He requested to open the record to present new evidence regarding the actual market value of the marital residence before any finding of fact or order were rendered in this case. Upon review, we find the trial court abused its discretion in relying on the stipulated value since it reflected a stale and inaccurate value and failed to achieve economic justice in this matter. Based upon the substantial difference between the stipulated and actual value and the timing of Husband's request, we are constrained to remand the case for the trial court to allow the admission of evidence of the market value of the marital residence.

In Husband's final claim, he essentially argues that the trial court erred in determining that insurance payments were to be paid separate from and in addition to his monthly support obligation to Wife. In his brief, he points out several inconsistencies in the record. He claims that over $44,000 in unpaid insurance premiums should not have been deducted from his APL overpayment.

We agree with Husband's that there are inconsistencies in the record regarding this issue. See Hearing Officer Report and Recommendation, 3/18/98; Trial Court Opinion, 12/30/98; Findings of Fact, 4/10/02, No. 39, at 10; Trial Court Opinion, 1/8/03, at 8-9. Upon further review of the trial court's January 8, 2003 opinion, we are unable to determine the reasons why it reverted to the hearing officer's recommendation requiring the separate payment for insurance. Because we are unable to find support for the trial court's order on this issue, we reverse and remand for further proceedings.

Order affirmed in part and reversed in part. Case remanded for further proceedings consistent with this memorandum. Jurisdiction relinquished.

/s/ Eleanor Valecko, Deputy Prothonotary.

THE SUPERIOR COURT OF PENNSYLVANIA

NO. 1522 and 1544 WDA 2002

IN RE: MARY ELLEN BOSICK V JOSEPH J. BOSICK

ORDER OF COURT

Mary Ellen Bosick's June 20, 2003 "petition to supplement brief" is DENIED.

/s/ Eleanor R. Valecko, Deputy Prothonotary

Date: June 24, 2003

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 172 & 173 WAL 2004

MARY ELLEN BOSICK *Pro se*,
Petitioner,

v.

JOSEPH J. BOSICK,
Respondent.
:

Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 21st day of July 2004, the Petition for Allowance of Appeal is hereby **DENIED.**

Mr. Justice Baer did not participate in the consideration or decision of this matter.

(4)

Supreme Court, U.S.
FILED
05-419 SEP 29 2005
OFFICE OF THE CLERK

APPENDIX II
STATUTES

No. _____

In The

Supreme Court of the United States

MARY ELLEN CHAJKOWSKI, *Pro Se,*
Petitioner/alternate payee

v.

JOSEPH J. BOSICK, *et al.,*
Respondent/self-employed plan participant and trustee,
Law firm employer- plan and plan trustees,
Pennsylvania judges.

On Petition for *Writ of Certiorari*
To the United States Court of Appeals for the Third Circuit

Petition for *Writ of Certiorari*

Mary Ellen Chajkowski, *Pro se*
5510 Hobart Street
Pittsburgh, PA 15217
412-904-2222

APPENDIX II

TABLE OF CONTENTS

STATUTORY PROVISIONS.....1

Employee Retirement Income Security Act, 29 U.S.C.S. § 1001 et seq.....1

Internal Revenue Code, 26 U.S.C.A. 401(k) (2004).....33

26 USCS § 408 (2005).....45

STATUTORY PROVISIONS

Employee Retirement Income Security Act, 29 U.S.C.A. § 1001 et seq. (2005).

29 USCS § 1003 (2005)

(a) Except as provided in subsection (b) or (c) and in sections 201, 301, and 401 [29 USCS §§ 1051, 1081, and 1101], this title shall apply to any employee benefit plan if it is established or maintained--

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) The provisions of this title shall not apply to any employee benefit plan if--

(1) such plan is a governmental plan (as defined in section 3(32) [29 USCS § 1002(32)]);

(2) such plan is a church plan (as defined in section 3(33) [29 USCS § 1002(33)]) with respect to which no election has been made under section 410(d) of the Internal Revenue Code of 1986 [26 USCS § 410(d)];

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

(4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or

(5) such plan is an excess benefit plan (as defined in section 3(36) [29 USCS § 1002(36)]) and is unfunded.

The provisions of part 7 of subtitle B [29 USCS §§ 1181

et seq.] shall not apply to a health insurance issuer (as defined in section 733(b)(2) [29 USCS § 1191b(b)(2)]) solely by reason of health insurance coverage (as defined in section 733(b)(1) [29 USCS § 1191b(b)(1)]) provided by such issuer in connection with a group health plan (as defined in section 733(a)(1) [29 USCS § 1191b(a)(1)]) if the provisions of this title do not apply to such group health plan.

(c) If a pension plan allows an employee to elect to make voluntary employee contributions to accounts and annuities as provided in section 408(q) of the Internal Revenue Code of 1986 [26 USCS § 408(q)], such accounts and annuities (and contributions thereto) shall not be treated as part of such plan (or as a separate pension plan) for purposes of any provision of this title other than section 403(c), 404, or 405 [29 USCS § 1103(c), 1104, or 1105] (relating to exclusive benefit, and fiduciary and co-fiduciary responsibilities) and part 5 (relating to administration and enforcement). Such provisions shall apply to such accounts and annuities in a manner similar to their application to a simplified employee pension under section 408(k) of the Internal Revenue Code of 1986 [26 USCS § 408(k)].

29 USCS § 1021 (2005)

§ 1021. Duty of disclosure and reporting

(a) Summary plan description and information to be furnished to participants and beneficiaries. The administrator of each employee benefit plan shall cause to be furnished in accordance with section 104(b) [29 USCS § 1024(b)] to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan--

(1) a summary plan description described in section

102(a)(1) [29 USCS § 1022(a)(1)]; and

(2) the information described in sections 104(b)(3) and 105(a) and (c) [29 USCS §§ 1024(b)(3), 1025(a) and (c)].

(b) Plan description, modifications and changes, and reports to be filed with Secretary of Labor. The administrator shall, in accordance with section 104(a) [29 USCS § 1024(a)], file with the Secretary--

(1) the annual report containing the information required by section 103 [29 USCS § 1023]; and

(2) terminal and supplementary reports as required by subsection (c) of this section.

(c) Terminal and supplementary reports.

(1) Each administrator of an employee pension benefit plan which is winding up its affairs (without regard to the number of participants remaining in the plan) shall, in accordance with regulations prescribed by the Secretary, file such terminal reports as the Secretary may consider necessary. A copy of such report shall also be filed with the Pension Benefit Guaranty Corporation.

(2) The Secretary may require terminal reports to be filed with regard to any employee welfare benefit plan which is winding up its affairs in accordance with regulations promulgated by the Secretary.

(3) The Secretary may require that a plan described in paragraph (1) or (2) file a supplementary or terminal report with the annual report in the year such plan is terminated and that a copy of such supplementary or terminal report in the case of a plan described in paragraph (1) be also filed with the Pension Benefit Guaranty Corporation.

(h) Simple retirement accounts.

(1) No employer reports. Except as provided in this subsection, no report shall be required under this section by an employer maintaining a qualified salary reduction

arrangement under section 408(p) of the Internal Revenue Code of 1986 [26 USCS § 408(p)].

(2) Summary description. The trustee of any simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of such Code [26 USCS § 408(p)] shall provide to the employer maintaining the arrangement each year a description containing the following information:

(A) The name and address of the employer and the trustee.

(B) The requirements for eligibility for participation.

(C) The benefits provided with respect to the arrangement.

(D) The time and method of making elections with respect to the arrangement.

(E) The procedures for, and effects of, withdrawals (including rollovers) from the arrangement.

(3) Employee notification. The employer shall notify each employee immediately before the period for which an election described in section 408(p)(5)(C) of such Code [26 USCS § 408(p)(5)(C)] may be made of the employee's opportunity to make such election. Such notice shall include a copy of the description described in paragraph (2).(i) Notice of blackout periods to participant or beneficiary under individual account plan.

(1) Duties of plan administrator. In advance of the commencement of any blackout period with respect to an individual account plan, the plan administrator shall notify the plan participants and beneficiaries who are affected by such action in accordance with this subsection.

(2) Notice requirements.

(A) In general. The notices described in paragraph (1) shall be written in a manner calculated to be understood by the average plan participant and shall include--

(i) the reasons for the blackout period,

(ii) an identification of the investments and other rights affected,

(iii) the expected beginning date and length of the blackout period,

(iv) in the case of investments affected, a statement that the participant or beneficiary should evaluate the appropriateness of their current investment decisions in light of their inability to direct or diversify assets credited to their accounts during the blackout period, and

(v) such other matters as the Secretary may require by regulation.

(B) Notice to participants and beneficiaries. Except as otherwise provided in this subsection, notices described in paragraph (1) shall be furnished to all participants and beneficiaries under the plan to whom the blackout period applies at least 30 days in advance of the blackout period.

(C) Exception to 30-day notice requirement. In any case in which--

(i) a deferral of the blackout period would violate the requirements of subparagraph (A) or (B) of section 404(a)(1) [29 USCS § 1104(a)(1)], and a fiduciary of the plan reasonably so determines in writing, or

(ii) the inability to provide the 30-day advance notice is due to events that were unforeseeable or circumstances beyond the reasonable control of the plan administrator, and a fiduciary of the plan reasonably so determines in writing,

subparagraph (B) shall not apply, and the notice shall be furnished to all participants and beneficiaries under the plan to whom the blackout period applies as soon as reasonably possible under the circumstances unless such a notice in advance of the termination of the blackout period is impracticable.

(D) Written notice. The notice required to be provided under this subsection shall be in writing, except that such notice may be in electronic or other form to the extent that such form is reasonably accessible to the recipient.

(E) Notice to issuers of employer securities subject to blackout period. In the case of any blackout period in

connection with an individual account plan, the plan administrator shall provide timely notice of such blackout period to the issuer of any employer securities subject to such blackout period.

(3) Exception for blackout periods with limited applicability. In any case in which the blackout period applies only to 1 or more participants or beneficiaries in connection with a merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor and occurs solely in connection with becoming or ceasing to be a participant or beneficiary under the plan by reason of such merger, acquisition, divestiture, or transaction, the requirement of this subsection that the notice be provided to all participants and beneficiaries shall be treated as met if the notice required under paragraph (1) is provided to such participants or beneficiaries to whom the blackout period applies as soon as reasonably practicable.

(4) Changes in length of blackout period. If, following the furnishing of the notice pursuant to this subsection, there is a change in the beginning date or length of the blackout period (specified in such notice pursuant to paragraph (2)(A)(iii)), the administrator shall provide affected participants and beneficiaries notice of the change as soon as reasonably practicable. In relation to the extended blackout period, such notice shall meet the requirements of paragraph (2)(D) and shall specify any material change in the matters referred to in clauses (i) through (v) of paragraph (2)(A).

(5) Regulatory exceptions. The Secretary may provide by regulation for additional exceptions to the requirements of this subsection which the Secretary determines are in the interests of participants and beneficiaries.

(6) Guidance and model notices. The Secretary shall issue guidance and model notices which meet the requirements of this subsection.

(7) Blackout period. For purposes of this subsection--

(A) In general. The term "blackout period" means, in

connection with an individual account plan, any period for which any ability of participants or beneficiaries under the plan, which is otherwise available under the terms of such plan, to direct or diversify assets credited to their accounts, to obtain loans from the plan, or to obtain distributions from the plan is temporarily suspended, limited, or restricted, if such suspension, limitation, or restriction is for any period of more than 3 consecutive business days.

(B) Exclusions. The term "blackout period" does not include a suspension, limitation, or restriction--

(i) which occurs by reason of the application of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 [15 USCS § 78c(a)(47)]),

(ii) which is a change to the plan which provides for a regularly scheduled suspension, limitation, or restriction which is disclosed to participants or beneficiaries through any summary of material modifications, any materials describing specific investment alternatives under the plan, or any changes thereto, or

(iii) which applies only to 1 or more individuals, each of whom is the participant, an alternate payee (as defined in section 206(d)(3)(K) [29 USCS § 1056(d)(3)(K)]), or any other beneficiary pursuant to a qualified domestic relations order (as defined in section 206(d)(3)(B)(i) [29 USCS § 1056(d)(3)(B)(i)]).

(8) Individual account plan.

(A) In general. For purposes of this subsection, the term "individual account plan" shall have the meaning provided such term in section 3(34) [29 USCS § 1002(34)], except that such term shall not include a one-participant retirement plan.

(B) One-participant retirement plan. For purposes of subparagraph (A), the term "one-participant retirement plan" means a retirement plan that--

(i) on the first day of the plan year--

(I) covered only the employer (and the employer's spouse) and the employer owned the entire business (whether or not incorporated), or

(II) covered only one or more partners (and their spouses) in a business partnership (including partners in an S or C corporation (as defined in section 1361(a) of the Internal Revenue Code of 1986 [26 USCS § 1361(a)])),

(ii) meets the minimum coverage requirements of section 410(b) of the Internal Revenue Code of 1986 [26 USCS § 410(b)] (as in effect on the date of the enactment of this paragraph [enacted July 30, 2002]) without being combined with any other plan of the business that covers the employees of the business,

(iii) does not provide benefits to anyone except the employer (and the employer's spouse) or the partners (and their spouses),

(iv) does not cover a business that is a member of an affiliated service group, a controlled group of corporations, or a group of businesses under common control, and

(v) does not cover a business that leases employees.

(j) Cross reference. For regulations relating to coordination of reports to the Secretaries of Labor and the Treasury, see section 3004 [29 USCS § 1204].

29 USCS § 1022 (2005)

§ 1022. Summary plan description

(a) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 104(b) [29 USCS § 1024(b)]. The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and

comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 104(b)(1) [29 USCS § 1024(b)(1)].

(b) The summary plan description shall contain the following information: The name and type of administration of the plan; in the case of a group health plan (as defined in section 733(a)(1) [29 USCS § 1191b(a)(1)]), whether a health insurance issuer (as defined in section 733(b)(2) [29 USCS § 1191b(b)(2)]) is responsible for the financing or administration (including payment of claims) of the plan and (if so) the name and address of such issuer; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan including the office at the Department of Labor through which participants and beneficiaries may seek assistance or information regarding their rights under this Act and the

Health Insurance Portability and Accountability Act of 1996 with respect to health benefits that are offered through a group health plan (as defined in section 733(a)(1) [29 USCS § 1191b(a)(1)]) and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act [29 USCS § 1133]).

29 USCS § 1023 (2005)

§ 1023. Annual reports

(a) Publication and filing.

(1) (A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 104(a) [29 USCS § 1024(a)], and shall be made available and furnished to participants in accordance with section 104(b) [29 USCS § 1024(b)].

(B) The annual report shall include the information described in subsections (b) and (c) and where applicable subsections (d) and (e) and shall also include--

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection.

(2) If some or all of the information necessary to enable the administrator to comply with the requirements of this title is maintained by--

(A) an insurance carrier or other organization which provides some or all of the benefits under the plan, or holds assets of the plan in a separate account,

(B) a bank or similar institution which holds some or all of the assets of the plan in a common or collective trust or a separate trust, or custodial account, or

(C) a plan sponsor as defined in section 3(16)(B) [29 USCS § 1002(16)(B)],